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INDIAN MINERAL DEVELOPMENT

HEARINGS

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 1894

TO PERMIT INDIAN TRIBES TO ENTER INTO CERTAIN AGREEMENTS FOR THE DISPOSITION OF TRIBAL MINERAL RESOURCES

FEBRUARY 12, 1982

BILLINGS, MONT.

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INDIAN MINERAL DEVELOPMENT

FEBRUARY 12, 1982

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Billings, Mont.

The committee met, pursuant to notice, at 9:30 a.m., in room 600 of the Yellowstone County, Mont., Courthouse, Senator John Melcher (acting chairman) presiding.

Present: Senator Melcher.

Staff present: Peter S. Taylor, general counsel, and Max Richtman, minority staff director.

Senator MELCHER. This is a hearing of the Select Committee on Indian Affairs to consider S. 1894, a bill to permit Indian tribes to enter into joint venture agreements and other agreements for the disposition of mineral resources.

First of all we would like to apologize for starting this hearing later than we called it. We were faced with a cancellation of a flight out of Washington late yesterday afternoon which forced us to stay in Minneapolis overnight and to come out on the first flight, and we just arrived.

The purpose of this bill, S. 1894, is designed to provide Indian tribes greater flexibility than they now have for the development and sale of their mineral resources. The objective is twofold. First, to further the policy of self-determination, and, second, to maximize the financial return tribes can expect for their valuable mineral resources.

I want to draw your attention to the fact that the bill, as it stands right now, would ratify, retroactively, secretarial approval of certain nonlease ventures, the statutory validity of which may be questioned. However, S. 1894 would not ratify the substance of the agreements but only the Secretary's authority to approve them, and I call this directly to your attention because legislation which proposes retroactivity always draws some concern on the effect of such action.

Now why is it that Indian tribes are asking for flexibility? That is apparent because an Indian tribe's ability to sell interest in minerals that it owns in trust is severely limited by a series of statutory prohibitions. Now let me recap these laws.

I have to start with an act passed in 1790. That is 1790, the start of this Republic of ours. The Non-Intercourse Act of the Indian Trade and Intercourse Act of 1790, which is 25 U.S.C. 177, says that tribes may not alienate an interest in land except when authorized to do so either by treaty or by an act of Congress. Unsevered minerals of all kinds are deemed to be an interest in land and, therefore, cannot be sold without appropriate authorization.

Then there are subsequent, though not quite as ancient, restrictions

of law; 25 U.S.C. 81 governs services contracts, including services connected with Indian lands. Section 81 could authorize a services contract to extract minerals for a tribe, but it does not authorize the tribe to sell the minerals and is basically a protective statute, not an authorizing one and thus is limited in scope. The only regulations promulgated pursuant to this section are those governing contracts with tribes for attorney's services, 25 CFR 72.

In the past 50 years—now that is taking a great leap forward, but it is going back to 1934—the Indian Reorganization Act authorized the tribes to establish federally chartered business corporations and to give corporations authority to lease tribal lands up to 10 years. The provision only applies to those tribes that are organized under the Indian Reorganization Act and subsequently were granted a corporate charter. Many Indian tribes did not do so. Further, the tribal corporations are limited to leases, and for 10 years.

Additionally, there is a solicitor's opinion in the Department of the Interior to the effect that a tribal business corporation cannot convey an interest in tribal minerals unless a tribe first conveys the land to the corporation. Obviously, very few tribes have made such conveyances.

In 1938 the Indian Mineral Leasing Act was passed. That is 25 U.S.C. 396(a), and it permits tribes to lease their trust lands for mining purposes. The statutory lease term is 10 years and for so long thereafter as minerals are produced in paying quantities. Leases are subject to the approval of the Secretary of the Interior. Section 396(b) requires that oil and gas leases be offered for sale by advertisement, followed by competitive bidding. Regulations implementing the 1938 act are found in 25 CFR 171.

Stepping backward—73 years ago, in fact—the act of 1909, which is 25 U.S.C. 396, authorized mineral leases of allotted lands; those owned by individual Indians but held in trust by the United States. Regulations are found in 25 CFR 172. Authority for oil and gas leasing of allotted lands can be argued as being broader than that for tribal lands, but allotted minerals are restricted by regulation to the same advertising and competitive bidding procedures that pertain to tribal lands.

Today, we are just exactly where we were after the 1938 act was passed. The 1938 act and the IRA have been treated as the sole authorities for new mineral leases of tribal lands. While leases for minerals other than oil and gas are not restricted by statute to competitive bidding, the regulations provide that this process be used unless the Secretary grants advance permission to the tribe or individual Indian owner to negotiate for a lease to dispose of these other minerals. If the Secretary rejects a negotiated agreement, then the minerals may be advertised for bid. In any case, the statute limits leases for all minerals up to 10-year terms, but so long thereafter as they produce in paying quantities.

Thus the need for S. 1894 arises by focusing on two main concerns. All development of oil and gas and other minerals are, by statute, limited to leases, and oil and gas leases are further restricted to a regulated advertisement/competitive bidding procedure. This procedure always contains the 10-year and production-in-paying-quantities terms, and it is of a standard structure; that is, payment of bonus

money, an up-front payment for the privilege of receiving a lease; rents that are paid annually based on acreage; and royalties, the percentage of the fair market value of severed minerals the tribes or allottees receive once those minerals are sold.

The royalty payments represent the largest income to a tribe or individual because they are paid when producing minerals are found. The percentage rate is usually fixed, however, for the term of the lease, which can go on indefinitely depending on how long the minerals are produced. Most often the royalties on existing leases have been 12½ percent, although some more recent leases have gone to 16⅔ percent or even higher. Some new leases also provide for a renegotiation of the royalty rate at certain intervals.

The law is designed to protect Indian tribes and allottees against exploitation of their mineral estates. However, leases which convey rights to take profitable minerals and other rights to land to permit extraction limit the tribes in developing more beneficial arrangements for mineral sales. Indian tribes, by law, therefore, may not be able to negotiate freely on selling minerals or participating in joint agreements to produce their minerals. Many tribes now want to participate directly in minerals production, either by developing the minerals themselves and selling them to consumers or by entering into joint venture partnerships, agreements with the energy production companies. However, several tribes have recently submitted nonlease venture contracts for mineral development to the Secretary of Interior, but because of questions about his authority to approve such agreements, they are being held in abeyance.

Since the 1938 act speaks only of development by lease, the possibilities for joint ventures, partnerships, and other nonlease ventures common in mineral development today may be extremely limited. Many tribes believe they should be entitled to determine which kinds of contracts are in their own best interest and to tailor agreements to their own particular needs. Such ventures can give the tribe greater participation in the profits of the venture and a larger role in managing the resource development. Conditions can be set for jobs for Indians in the development as part of the contract.

Of course, the Secretary, as trustee, needs to continue a strong role in monitoring agreements for overall fairness in terms. However, tribal autonomy and self-determination should certainly include the right to negotiate terms of contracts like any other owner of valuable resources. Nonlease type ventures can provide a variety of opportunities that would benefit the long-term jobs and income of the tribe and its members and should also allow management positions and participation in the decisionmaking process for Indian tribes. Furthermore, energy companies are now often discouraged from pursuing mineral development on Indian lands. For many tribes, their future wealth and security remains underground where they own valuable minerals, whether it is oil and gas or coal or geothermal.

Now to this bill, S. 1894. It is designed to provide much greater flexibility in the conditions and manner of entering into mineral resource development. The bill leaves to regulation the mechanisms by which the Secretary will review the agreements and the manner in which the agreements are reached. It leaves the Secretary to determine, by regu-

lations, the terms than an agreement would include and the financial return to the tribe or individual. It is up to the Secretary to see that it is fair and meets the trust responsibilities that he has. Regulations can be flexible to respond to new requirements or adapt to changes in the mineral industry. The Secretary's trust responsibility would remain intact, and the 1938 Mineral Leasing Act would be unchanged so that tribes who prefer to use that act with the existing competitive leasing process can continue to lease under those provisions. Certain nonlease type ventures were approved by the Secretary of the Interior between January 1, 1975, and September 1980, either under a tribe's general contracting authority or under the premise that leases in today's mineral industry can mean much more than the traditional BIA lease form. However, for oil and gas particularly, the approval may rest on authority that could be challenged, causing financial harm to the tribes, to the Federal Government as trustee, and to the individual companies involved. There are five existing agreements of this type, and S. 1894, as introduced, can retroactively provide ratification of the Secretary's authority to have approved those five existing agreements. The agreements still, of course, would be open to challenge under equity law, such as breach by either side, unconscionability, and so forth.

There is no intent to alter or limit the obligation or judicial remedies that might otherwise be available to the parties who have entered such an agreement, and I draw that to the attention of both the tribes and energy interests. This is a two-way street, and contracts create liabilities which must be met.

Now I introduced this bill on November 30 of last year. It is a bill that we started drafting well over a year prior to that time; started consideration of what should be in the draft bill.

I want to draw your attention finally to section 2, which deals with individual Indians on allotted lands who own the minerals. Section 2 provides that individual Indians who own trust or restricted minerals within the boundaries of a reservation where the tribe is entering into an agreement pursuant to the first part of this bill may join in such an agreement with the tribe, subject to the approval of the Secretary. Now the Secretary, in his added discretion, may also approve agreements listed in section 1 of the bill for individual Indians who own trust or restricted minerals. Again it must be made clear that that is an option for the individual allottee who owns minerals. All the provisions of the acts of 1938 and 1909, the usual provisions of leasing, also remain open to them, so it is an option they can use or choose not to use, and if they want to stick with the 1938 leasing provisions, they can do so.

This is the type of flexibility we are talking about. That is the purpose of the bill and the background of the longstanding need to allow for more opportunity for Indian tribes and individual Indian allottees to develop their minerals.

At this time, I will place a copy of S. 1894 in the hearing record.

[The bill follows:]

97TH CONGRESS
1ST SESSION

S. 1894

To permit Indian tribes to enter into certain agreements for the disposition of tribal mineral resources, and for other purposes.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 30, 1981

Mr. MELCHER introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

---

A BILL

To permit Indian tribes to enter into certain agreements for the disposition of tribal mineral resources, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) any Indian tribe may enter into any joint venture agreement, operating agreement, joint production agreement, risk services agreement, managerial agreement, lease (other than a lease approved pursuant to the Act of May 11, 1938), or other agreement approved by the Secretary of the Interior (hereinafter referred to as the "Secretary") for the disposition

of oil and gas, geothermal, or other mineral resources of tribal lands, or for the sale of production from operations on tribal lands. Any such agreement shall be for such term and be subject to such conditions as may be prescribed by the Secretary by regulation. The Secretary shall approve any such agreement within one year of submission to him unless the Secretary finds that such agreement is not in the best interest of the tribe.

(b) Whenever the Secretary disapproves an agreement pursuant to subsection (a) he shall state his findings in writing within thirty days of making his decision. Upon disapproval of a tribal proposal the tribe shall have an opportunity for Presidential review provided that request for review is filed within thirty days.

SEC. 2. (a) Individual Indians owning trust or restricted minerals within the boundaries of a reservation subject to an agreement entered into pursuant to section 1 of this Act may join in such an agreement with the tribe, subject to the approval of the Secretary of the Interior.

(b) The Secretary at his discretion may approve agreements listed in section 1 for individual Indians owning trust or restricted minerals.

SEC. 3. Agreements of the type described in the first section of this Act for the development of production of oil and gas or other mineral resources of tribal lands approved

by the Secretary prior to the date of the enactment of this Act are hereby ratified as of the date of such approval.

SEC. 4. Nothing in this Act shall affect the validity of any lease approved or hereafter approved pursuant to the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a et. seq.).

SEC. 5. Within one hundred and eighty days, the Secretary of the Interior shall promulgate rules and regulations to implement the provisions of this Act.

Senator MELCHER. Our first witness today will be Jerry Bathke, Indian affairs representative, and Tom Holland, land manager, for ARCO Exploration in Denver, Colo.

STATEMENT OF CURT BURTON, ATLANTIC RICHFIELD CO., DENVER, COLO.

Mr. BURTON. Senator Melcher, Mr. Bathke and Mr. Holland are not able to be with us today. I am Curt Burton with Atlantic Richfield Co., and I have their prepared statement to read.

Senator MELCHER. That will be fine.

Mr. BURTON. This is a statement by Mr. Thomas L. Holland.

I am Western U.S. land manager for ARCO Exploration Co., a division of Atlantic Richfield Co. ARCO Oil & Gas Co. is also a division of Atlantic Richfield Co. We appreciate your invitation to appear here today and to make public our position favoring the enactment of Senate bill 1894, which affords greater flexibility and restates more clearly that Indian tribes and individual Indians have the authority to enter into agreements in a variety of forms, including leases, for minerals exploration and development.

Atlantic Richfield Co., ARCO, is a major domestic corporation engaged in a fully integrated range of energy and mineral activities. ARCO has many years of experience in operating on Indian lands for oil and gas exploration, production, and transportation. Additionally we have been supportive of the Indian communities' aspirations for self-determination and their efforts toward social and economic self-sufficiency. We are committed to the understanding and improvement of the relationship between Indians and non-Indians and believe this commitment is reflected in our past dealings.

ARCO fully supports S. 1894 as drafted for the following principal reasons:

No. 1, the bill is an important and positive step in advancing Indian self-determination;

No. 2, it assures Indians and industry the use of greater flexibility to tailor agreements relating to oil, gas, and other minerals to address the specific needs of both parties; and

No. 3, it removes any ambiguities that may exist in current law with regard to exploration and development agreements affecting Indian lands.

Having submitted these broad reasons for our support of S. 1894, some detail on each is offered below.

The proposed legislation, as I said before, takes an important and positive step in advancing Indian self-determination. Due to this initiative, further Indian economic advances may be made because the major decisionmaking process with respect to mineral development will rest with the tribe or with the individual, encouraging them to establish more firmly a business-oriented infrastructure. Such a business-oriented framework will, in our view, enrich the ability of Indians to manage their own affairs more effectively.

The present Federal system, which was established some 50 years ago, now tends to stifle the business capabilities we referred to above by removing the decisionmaking process from Indians. We believe that

the passage of this legislation properly places the initiation of the decisionmaking process with the Indians.

My second point was, negotiated agreements afford Indians and industry greater flexibility. ARCO has operated for many years under both lease agreements and agreements in other forms. We support the retention of leasing under 25 U.S.C. 396. We also recognize that some circumstances warrant an approach that may serve the needs of the parties better than a traditional oil and gas lease.

ARCO has two active agreements with Indian tribes that are not traditional oil and gas leases; one with the Northern Cheyenne Tribe and one with the Jicarilla Apache Tribe. Both agreements have been approved by the Department of the Interior. These negotiated agreements represent, in our view, the benefits that come with a greater degree of flexibility that both Indians and industry can exercise given the opportunity to do so.

The agreements are comprehensive in that they address exploration, drilling, discovery, production, and marketing in the framework of a mutually beneficial understanding between Indian tribes and a private corporation. Our agreement is reservationwide in scope; the other is limited to a smaller area, reflecting specific tribal needs and goals.

The agreements provide for, in varying degrees, training and employment, education, the subcontracting of certain activities to Indian-owned business enterprises, and the funding of tribal offices to administer the agreements, again based on the specific needs of the tribe and the company.

When compared to traditional oil and gas leases, these arrangements are unique. Certain provisions were the result of negotiating equities perceived to be of importance to the parties within the business framework but outside the scope of a traditional oil and gas lease.

The third point was S. 1894 removes any ambiguities. Currently existing law allows Indian lands to be leased for oil and gas under the provisions of title 25 U.S.C. 396. Contractual arrangements to explore, develop, produce, and sell Indian mineral resources under contract terms which do not conform to the form and procedure established under section 396, may be entered pursuant to the authority of title 25 U.S.C. 81.

There is no doubt that Indian tribes may enter oil and gas leases pursuant to section 396 and other contracts pursuant to section 81. The answer is less clear as to whether or not Indian tribes or individual Indians can enter oil and gas lease contracts under the authority of section 81. Any ambiguity should be resolved by clearly stating that oil and gas leases, and exploration and development agreements not within the traditional framework, are among the agreements that are authorized under S. 1894 and that were authorized under section 81. Section 3 of S. 1894 confirms the validity of previously entered similar agreements and is appropriate for purposes of insuring that legislation intended principally to restate and clarify longstanding legislative intent to authorize certain contracts does not have the effect of frustrating the same legislative purpose as to periods prior to the enactment of the clarification.

In conclusion, the time is long since past when Indians need pro-

tection against unequal trading ability which might be brought to bear by industry. Our recent experience in conducting business with representatives of Indian tribes is that the tribes, represented by their elected authorities and by retained experts, bring to the negotiating table a level of sophistication and trading skill that rebuts any alleged need for a status resembling guardianship for the protection of tribal assets.

Under the terms of S. 1894, when circumstances are such that leasing under section 396 is the desirable course, that avenue remains fully available. On the other hand, if it is determined that an oil and gas lease, or other contract of a different form, or one entered following procedures other than those specified in section 396 would better fit the needs of the individual or tribe and the other contracting party, a form and procedure tailor-made for that transaction could be followed for the mutual benefit of all parties to the transaction.

The Atlantic Richfield Co. expresses its support of S. 1894 and appreciates the opportunity to make its position known.

Senator MELCHER. Now, Mr. Burton, does ARCO have two such contracts? Did I understand you correctly?

Mr. BURTON. Yes, sir.

Senator MELCHER. With the Northern Cheyenne and Jicarilla Apache?

Mr. BURTON. Yes, sir.

Senator MELCHER. The contract with the Jicarilla is the older one?

Mr. BURTON. That is the older one, yes.

Senator MELCHER. Are you actually in development and production there?

Mr. BURTON. That is correct.

Senator MELCHER. Are they the sole contracts with the Jicarilla?

Mr. BURTON. It is my understanding that this is correct; yes.

Senator MELCHER. Are you familiar with the terms of the contract with the Northern Cheyenne?

Mr. BURTON. Not the specific details. I was not a party to that contract. If you do have questions, Senator, that need clarifying, I will be happy to relay those and respond in writing to them.

Senator MELCHER. Subsequent to this hearing, we may have questions about the exact status of the agreement.

Thank you, very much, sir.

Mr. BURTON. Thank you, Senator.

Senator MELCHER. Our next witness is Leland Ground of the Blackfeet. He needs to be leaving quickly, I suppose, to get an airplane.

Please proceed, Leland.

STATEMENT OF LELAND GROUND, MEMBER, BLACKFEET TRIBAL COUNCIL AND CHAIRMAN, MINERAL COMMITTEE, ACCOMPANIED BY PHILIP E. ROY, ATTORNEY AT LAW

Mr. GROUND. My name is Leland Ground, member of the tribal council, Blackfeet Tribal Business Council, and chairman of the Mineral Committee. With me is the general counsel of the tribe, Philip E. Roy.

To the Senate Select Committee on Indian Affairs, the Honorable

Senator Melcher, it gives me great pleasure to offer this testimony on behalf of the Blackfeet Tribe of Indians in support of Senate bill 1894.

The Blackfeet Tribe certainly would like to thank the committee, Senator Melcher, and his staff for the efforts that they have put forth in providing the vehicles to the tribes for self-determination and increasing the energy awareness and strength of this great Nation. The Blackfeet Tribe, as well as other tribes, are ready to assist this country in energy independence. To do that, the tribes must develop the capability to develop their own resources based on their own goals and needs.

For many years the Blackfeet have endeavored to enter into their own social, cultural, economic situations, only to be met by restrictive regulations and unawareness of what the tribes truly need. Well-known examples are the Damson agreement in which the Blackfeet Tribe first stepped out of the 1938 purview, the well-known 18 points in principle for negotiations developed with the aid of the Council of Energy Resource Tribes to guide the tribes' negotiations, and most recently the Blackfeet have attempted to modify and skirt the 1938 Mineral Leasing Act by trying to advertise with subsequent negotiations.

We must never forget the tribal/Federal relationship in regard to trust responsibility. We must also remember that the tribes are real in terms of their people, their resources, and their environment, and that their concerns must be met by positive relationships and adaptability.

We are concerned that the bill's language may frustrate the basic purpose to provide greater self-determination to tribes and the development of their resources. This is because it grants too great a regulatory role to the Secretary of the Interior. This bill is not self-implementing; instead, particular agreement terms must first be authorized by the Interior's regulations. This puts Interior into paramount control to dictate minimum terms even before negotiations begin instead of allowing tribes and allottees to determine desired agreement terms in the first instance. The Secretary of the Interior and his regulation writers are simply not wise enough and cannot foresee the future well enough to prescribe minimum terms and conditions that are desirable in all circumstances, both today and tomorrow. No concept of fair agreements can be applied across the board to different agreements and to different tribes.

For example, periodic renegotiation of the agreement terms may make little sense where the tribe has an escalating profit share in a joint venture, and obtaining the highest economic return may not be sensible when an agreement offers superior tribal management, employment, or cultural protection elements. Furthermore, what fair and equitable terms there may not be tomorrow, as resource development agreements continue to evolve. This is the very reason we can no longer depend on the 1938 act and its regulations. Let us not repeat that mistake with Senate bill 1894 and its respective regulations.

Our suggestions: Of course, keep the Secretary's ultimate best interests of the tribes trust review; change the requirement of regulations dictating minimum terms to an authorization to the Secretary to pub-

lic advisory guidelines; make the bill self-implementing by not directing the issuance of regulations to implement the act, but, rather, authorize the Secretary to issue regulations consistent with the act. This would allow tribes to enter into agreements even if the regulations are not forthcoming, are tied up in litigation, or do not expressly authorize a specific type of agreement. Although the bill does contain a 180-day requirement for issuance of regulations, we do not believe that the deadline will be met, particularly if those regulations contrary to our suggestions contain minimum terms for each form of agreement. This would be a far lengthier task, even for a team of the best corporate lawyers. The bill does not inadvertently create a moratorium on tribal agreements.

As written testimony, the Blackfeet Tribe offers the following, and I have already turned that in to Max, and we will be providing follow-up to our testimony for a positive outcome of this bill.

If there are any questions, we would be glad to answer them in the form of the following.

Senator MELCHER. Well, Leland, that is nice of you to be kind to corporate lawyers, but it is a well-known fact that country lawyers are the shrewdest. You have one right there to your right.

Has the Damson agreement been satisfactory?

Mr. GROUND. The Damson agreement, I would say, served a purpose, and it served a specific. There are certain things that are satisfactory in it, but there are certain things that are not. One of the elements that we see in the Damson agreement is the control aspect, the construction of the accounting procedures; the inspection of the actual production that takes place subsequent to that agreement.

Senator MELCHER. How much acreage does the Damson agreement cover?

Mr. GROUND. I cannot really tell you the exact acreage at this point. We have just amended the Damson agreement to include 12,700 acres.

Senator MELCHER. Additional?

Mr. GROUND. In addition to their existing operations. I would say roughly around 40,000 acres.

Senator MELCHER. How much of the reservation is considered to have interest in oil and gas development or is already in production?

Mr. GROUND. I would say one-fourth or less. There is a total of approximately 685,000 mineral acres still open for development.

Senator MELCHER. That are still open?

Mr. GROUND. Still open. That is tribal, and there is an additional amount of allottees and fee interests.

Senator MELCHER. Well, are some of those acres, though, of no interest to anybody as far as likelihood of development?

Mr. GROUND. I think most of the reservation, even in terms of other minerals, is potential for development.

Senator MELCHER. Does the Damson agreement cover any individual allotted lands?

Mr. GROUND. It does not.

Senator MELCHER. So, it is just for the tribe itself?

Mr. GROUND. Yes.

Senator MELCHER. It is our understanding that the Damson agree-

ment, the type of agreement that you are calling the Damson agreement, could not be applied to individual allottees.

Mr. GROUND. I would say that it could if it were structured differently to include the allottees, like in future dealings.

Senator MELCHER. Yes.

Mr. GROUND. But not the present.

Senator MELCHER. But that would require a change in the law, would it not?

Mr. GROUND. Yes, it would. It could apply to the individual allottees only like in unitizations or communitizations. That is where you need to communitize adjacent acreage to the Damson areas.

Senator MELCHER. But at their option?

Mr. GROUND. But at their option.

Senator MELCHER. Thank you very much.

Mr. GROUND. Thank you, Senator.

Senator MELCHER. Without objection, your prepared statement will be placed in the record at this point.

[The prepared statement follows:]

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SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

Billings, Montana
February 12, 1982

STATEMENT OF THE BLACKFEET TRIBE

Recently, the Blackfeet Tribe has received several proposals for exploration and development of oil and gas on undeveloped acreage within the Blackfeet reservation boundaries. The Tribal Council of the Tribe believes that joint exploration and development agreements, not subject to the restrictions of the 1938 Indian Mineral Leasing Act could be negotiated with private companies on a basis which would be a greater advantage to the Tribe than leases advertised for bid and issued under the 1938 Leasing Act. The Tribe also considers that authority to the Tribe to establish its own requirements for exploration and development agreements, would permit the Tribe to control its tribal resources and develop expertise of tribal members in resource management in a manner which is difficult under the lease arrangements heretofor supervised by the Bureau of Indian Affairs.

The Assistant Secretary for Indian Affairs has advised that agreements similar to those approved for other tribes, either joint exploration and development agreements or joint ventures, will no longer be approved, leaving only two ways which the Tribe can develop its oil and gas resources - under the 1938 Leasing Act or by development of resources itself.

We believe it is essential for tribes to have alternatives available for joint exploration and development agreements or other agreements outside of the 1938 Act.

Tribes can be expected to evaluate proposals by companies more closely than the BIA. The tribes now have the Council of Energy Resource Tribes to assist them in evaluating proposals and the tribes desire to assert options to participate on a working interest basis or sliding scale royalties. The tribes also wish to provide for more comprehensive development programs than are generally required under the leases issued by the BIA and to protect the social and cultural environment of the reservations. The tribes also want to provide for reclamation, assistance in developing training programs, and encouraging employment of tribal members and on-reservation industry which can be done with the type of close cooperation envisioned in joint venture operations rather than leases. The tribes will be able to enter into innovative agreements such as those entered into between private companies and will be able to insert provisions which assure the tribes both full share of the fruits of development of its land and participation in the development process by tribal personnel.

For more than a decade the United States has maintained a policy of Indian self-determination which has gone practically without realization. To recognize the full potential of Indian tribes as sovereign governments within the framework of the United States Constitution and its socially and culturally distinct communities as self-sufficent economic units, it is essential that tribes be allowed to make decisions regarding their resources. For these reasons and many more which remain unspoken the Blackfeet Tribe fully supports the passage of Senate Bill 1894, but suggests the following amendments for the reasons set forth below:

S.1894 raises the following concerns which we request be addressed before the Bill is brought to a vote in the Senate.

1. In listing the types of agreements that a tribe may enter into, we request that in the first paragraph the following be inserted after the words "joint venture agreement" in the fourth and fifth lines:

   . . . (including those entered into pursuant to 25 U.S.C. §81 and/or previously approved by the Secretary).

   The Tribe requests that the legislation read to completely assure that those agreements or leases entered into by Indian tribes before passage of the Bill be validated in all respects.

2. We request the following words be inserted before the word "disposition" in the twelfth line:

   . . . exploration, development, operation and . . .

   This language would allow for exploration and development of Indian mineral resources without disposition.

3. We request the following be inserted after the word "may" in the fourth line:

   . . . develop its own tribal lands or . . .

   This will allow without question self-development of the tribal land by the tribe. Although we believe no legal question has been raised to date concerning this matter, the Blackfeet Tribe is interested in developing its own property and likewise other tribes may also be interested.

4. We request the following language be inserted at the end of the second full sentence after the word "regulation":

   . . . or determined by the Secretary upon review of any such agreement.

   This will allow the Secretary to review agreements that are entered into and submitted to the Secretary before regulations are adopted and will also provide the Secretary flexibility to allow an Indian tribe to enter into a term that is shorter or more restrictive than that prescribed by regulation.

5. We request that the following language be inserted after the word "Secretary" as first used in the third sentence:

   . . . or his authorized delegate . . .

The Tribe is concerned that any such agreement be reviewed and approved as quickly as possible and therefore recommends that the Secretary be authorized to delegate approval authority to the Area Director or Agency Superintendent or some other authorized delegate

within the Department of the Interior. We are all aware of the time constraints placed on the Secretary of the Interior and that he would not have time to personally review and approve each agreement submitted by an Indian tribe.

6. We request that the words "one year" in the third sentence be deleted and replaced with "one hundred twenty days" and the following be inserted at the end of Section 1:

> Any such agreement not approved by the Secretary within one hundred twenty days of submission shall become effective without the approval of the Secretary.

7. We request that the following be inserted in Section 1, subparagraph (b), after the word "decision":

> . . . and shall meet with the Tribe and company involved to review his findings and attempt to resolve his objections by discussing the objections with the parties and seeking a satisfactory resolution. If such a resolution cannot be reached, the Secretary shall issue his disapproval within ten days of the date of said meeting.

The Tribe objects to authority granted to the Secretary to disapprove a proposed agreement without a review and discussion by the Secretary to resolve the questions raised. We think that such a procedure should be mandatory and will prove to be beneficial to all parties in the long run.

8. We request that the word "exploration" be inserted before the word "development" in the second line of Section 3 and that the word "of" in the third line of Section 3 be deleted and that the word "and" be inserted in its place. We further request that the following be inserted after the word "Act" in the sixth line of Section 3:

> . . . or which are pending as of the date of the enactment of this Act.

We will be pleased to work with the Committee in support of this bill.

Senator MELCHER. Our next witness is George Hiwalker, Jr., vice chairman of the Northern Cheyenne Tribe.

STATEMENT OF GEORGE HIWALKER, JR., VICE PRESIDENT, NORTHERN CHEYENNE TRIBAL COUNCIL, LAME DEER, MONT.

Mr. HIWALKER. Mr. Chairman, I am George Hiwalker, Jr., vice president of the Northern Cheyenne Tribal Council. I appreciate this opportunity to provide testimony regarding S. 1894. Also, I am grateful to Senator Melcher and his staff for their efforts in preparing and introducing this bill.

I am aware that, to some significant extent, S. 1894 is intended to address legal concerns which had been raised in 1980 by the former Solicitor of the Department of the Interior, Clyde Martz, in connection with a proposed oil and gas exploration and drilling agreement between the Northern Cheyenne Tribe and the Atlantic Richfield Co., ARCO. In considering a request for secretarial approval of that agreement, Solicitor Martz expressed uncertainty as to whether such an agreement was authorized for secretarial approval under prevailing Federal law. As I understood it, the Solicitor was concerned about two distinct legal questions.

(*a*) If the ARCO/Northern Cheyenne agreement was characterized as a lease of tribal oil and gas under the Minerals Leasing Act of May 11, 1938, and the Solicitor was uncertain about whether there had been substantial compliance with competitive bidding requirements which may have been applicable under the leasing act.

(*b*) On the other hand, if the agreement was not a lease, but nevertheless involved conveyance by the tribe to ARCO of an interest in tribal subsurface estate, then Solicitor Martz was uncertain about whether such a conveyance was authorized under existing Federal law.

Although ARCO and the tribe did not necessarily agree that the Solicitor's concerns were valid, to expedite approval of the agreement and the commencement of operations, it was agreed by the Solicitor, ARCO, and the tribe, that departmental approval of the agreement would be given without warranty by the Department as to the legal effect of that approval and that, subsequently, the parties would support an appropriate legislative proposal which would remove any legal questions regarding the ability of the Secretary to approve the general type of agreement presented by the tribe and ARCO.

My testimony today will address only section 3 of S. 1894, which appears intended to resolve the Solicitor's concerns about whether secretarial approval authority previously existed under Federal law. Our tribe is concerned, as well, with the remaining provisions of S. 1894. However, since I received a copy of the bill only a short time ago, I have not yet had an opportunity to fully discuss all aspects and implications of those remaining provisions with our tribal council or tribal attorneys. I understand that a subsequent hearing in Washington, D.C., on S. 1894 is contemplated. Therefore, I request that I be given the opportunity to provide additional testimony regarding this legislation at that hearing, or, in any event, through the subsequent submission to the committee of fuller written comments.

I will briefly address section 3 of S. 1894. In my view, the proposed

section 3 is inappropriate and unwarranted. It goes well beyond the specific legislative purpose envisaged by the tribe and, for that matter, by the Solicitor and ARCO, in consenting to a legislative approach. It was the tribe's understanding that such legislation would serve the limited purpose of removing any cloud on our agreement arising from any lack of authority in the Secretary to approve the type of agreement presented by the Northern Cheyenne/ARCO agreement. The proposed section 3, however, seemingly would constitute a wholesale congressional approval of each and every term and condition of our particular agreement. We did not intend, and cannot now agree to, such an action by the Congress.

First, I believe that such legislative action would be unprecedented. Second, it would be inappropriate. If Congress truly desired to give such all-encompassing approval to our complicated and far-reaching agreement, it must first conduct the kind of particularized analysis of our agreement which, under the U.S. trust obligation to our tribe, would be necessary to support such wholesale congressional approval. I doubt this committee itself is interested in conducting, or, for that matter, equipped to conduct, such an inquiry, nor do I think that Congress desires to deviate from the longstanding practices of committing such tasks to the Secretary of the Interior.

Finally, I think that such a congressional action would be ill advised. Section 3 does not identify the particular prior agreements it would cover. Is this committee confident that if such all-encompassing congressional approval is given, it would be appropriate as to each existing agreement falling within the terms of section 3?

For these reasons, I believe that section 3 should be substantially revised along either of the following items.

(*a*) Section 3 should be redrafted to provide simply that agreements of the type described in section 1, which were previously approved by the Secretary, shall not be invalid due to the precious absence of congressional legislation expressly authorizing such agreements.

(*b*) Alternatively and perhaps preferably, section 3 should be redrafted to authorize the parties to any such existing agreement to apply to the Secretary for approval of the agreement, with such secretarial approval being retroactive to the original date of the agreement.

I believe that either of these alternatives would be acceptable to the Northern Cheyenne Tribe, and there may indeed be other approaches which the tribe would find acceptable. However, I believe it is essential that this committee understand that it would be good practice, and, I am advised, perhaps legally necessary that this committee receive consent from the tribe and from ARCO to the specific terms of any proposal to place a congressional seal of approval on any aspect of the Northern Cheyenne/ARCO agreement.

I wish to mention again the desire of the tribe to reserve the right to submit to this committee additional testimony or written comments on this legislative proposal, after our tribal council has had an adequate opportunity to fully analyze all of its implications.

Mr. Chairman, thank you for your courtesy, attention, and consideration in this matter.

Senator MELCHER. I think it wise that you do have your counsel, in consultation with ARCO, to suggest this type of language. I am not

too prone to even have any retroactivity in this bill, but what section 3 does is allow them to stand in place. It does not get into the contract terms at all. We can drop the section, which to my understanding is not advocated by the Secretary nor by the tribes involved, because we are wondering where there will be litigation. Perhaps litigation is the best approach.

Second, the section seeks, as I described earlier, not to pass judgment on the terms of the contract but to permit the Secretary's approval to stand not based on the substance of the contract, but just to notify his approval.

Now, that can be redrafted many different ways, but, first of all, there is a question of whether we want it in here or not, and the Northern Cheyenne, the Jicarilla Apache, and the others who have such agreements should consider whether this unusual procedure of retroactivity should be allowed at all because the only advantage of taking this very unusual step, retroactivity, is for those five agreements now in place; yours, Northern Cheyenne's, being one of them. But in no sense would we contemplate or intend that section 3 looks at the terms of the contract between the tribe and the individual company.

You have suggested two alternatives. I suggest the first alternative is whether there should be a retroactivity feature in it at all. That is the first alternative, and, second, I think what you are describing in your recommendation of (a) for section 3 redrafting, simply that the Secretary's approval, since January 1975, the agreements which have been authorized by section 1 of this act, and which were not authorized by the act of May 1938, is hereby ratified. I think that is what you are suggesting, is it not?

Mr. HIWALKER. Yes, sir.

Senator MELCHER. That was our intent as we drafted section 3. Our analysis of section 3 is that it merely ratifies the Secretary's authority to approve those five agreements. We are not particularly protective of any draftsmanship we have here, but that is our analysis of the clear intent of section 3.

But, again, I think the first point is should there be a section 3 at all? We put it in there to open the discussion on that and have hearing testimony on it, because retroactivity is an unusual procedure and one that I hardly ever endorse. I do not know in the final analysis if I will endorse this. Retroactivity waves a flag in C[illegible]ss. "What is going on? Why change the rules in a bill to affe[illegible]mething that has already happened?"

It does get a little bit sticky, so we will anticipate your written comments on specific language. You already have the substance of your proposal. We will anticipate further comments from you on specific language and, first of all, remind you whether or not you want section 3 in there, the type of ratification of previous acts by the Secretary in its trust responsibility.

Mr. HIWALKER. We will be coming back with full statements on this.

Senator MELCHER. All right. Thank you very much, George.

Mr. HIWALKER. Thank you.

Senator MELCHER. Clayton Small?

STATEMENT OF CLAYTON SMALL, REPRESENTING FIVE DISTRICTS OF THE NORTHERN CHEYENNE INDIAN RESERVATION AND TRADITIONAL CULTURAL MEMBERS OF SOCIETIES, ACCOMPANIED BY DON McMANUS, GENERAL CHAIRMAN OF THE FIVE DISTRICTS; WAYNE LITTLE WHITEMAN, TRADITIONAL CULTURAL MEMBER; AND CHARLES WHITEDIRT, SR., TRIBAL ELDER AND TRADITIONAL LEADER, LAME DEER, MONT.

Mr. SMALL. Senator Melcher, I wonder if it would be appropriate to have several other members step forward as a part of this?

Senator MELCHER. Clayton, will you state for the record who you are representing? And it is appropriate if you want somebody to accompany you.

Mr. SMALL. Thank you.

Senator MELCHER. Would you please identify them and state for the record whom you represent?

Mr. SMALL. Senator Melcher, I am here as part of a group of Northern Cheyennes who are very concerned about Senate bill 1894. The group is representative of the five districts from the Northern Cheyenne Reservation, including the five district chairmen and also the general chairman, and I would at this time like to call forward the general chairman, Don McManus, and any other district chairmen that are present.

Then, in addition to the district representatives, we also have some traditional cultural members of societies from the Northern Cheyenne Reservation. The spokesperson for that group is Wayne Little Whiteman, and also a tribal elder, traditional leader, Charlie Whitedirt, Sr., and I would like to have those members step forward, please.

Senator MELCHER. Certainly.

Mr. LITTLE WHITEMAN. I have to interpret for this gentleman.

Senator MELCHER. All right.

Mr. SMALL. Senator Melcher, my portion of this testimony will be very brief. I would like to read a petition that has approximately 370 signatures [1] of eligible enrolled Northern Cheyenne members and then defer any further comments to the representatives that are to my right.

I would like to preface this by thanking the Select Committee on Indian Affairs for conducting field hearings on this very important, I believe, and controversial, at this time, Senate bill 1894. It is somewhat our understanding, I guess, and it is arguable, that Senate bill 1894 was organized and written partly because of the five agreements with the five reservations and tribes that you have mentioned, including northern Cheyenne, and we are very pleased that the committee has, in fact, brought one of the field hearings to Billings where one of the reservations and tribes in question is located.

The petition states:

" The northern Cheyenne people are in support of Senate bill 1894 with the exception of section 3. If passed, this section will waive all rights of the northern Cheyenne Tribe to renegotiate and enter into a more lucrative and beneficial agreement with ARCO, particularly the right of the tribe to tax in light of the recent, January 25, 1982, U.S. Supreme Court decision authorizing tribes the right to tax.

[1] Retained in committee files.

We, the undersigned enrolled members of the northern Cheyenne Tribe, oppose section 3 and request the U.S. Senate Select Committee assist the northern Cheyenne Tribe to get a second opinion and renegotiate the ARCO agreement prior to the passage of Senate bill 1894.

I think part of this rationale and request in behalf of the people who have signed this petition is that the Select Committee take a look at all of the existing documents pertaining to the ARCO agreement and perhaps make those available to the people that are represented as part of this testimony at this time.

And with that, I would like to defer further comments to Wayne Little Whiteman, who will interpret for the traditional leader for the northern Cheyenne, Charlie White Dirt, who represents the societies from the reservation.

Mr. WHITE DIRT. [Speaking in northern Cheyenne].

Mr. LITTLE WHITEMAN. Mr. Charles White Dirt is a headsman of the Elk Horn Society of the "Northern Cheyenne Military Society," and, for this reason, for his testimony here today, he is saying that he is 75 years old. He has his own land, allotted land, plus other estate land. That he is entitled, and he is quite concerned on this one section that this bill is talking about. He is saying that he does not like the language of this section 3. He is telling you today that as a friend one time, that he respected and he honored you, but today he is looking at you in a different way because he is looking at you as a man wearing two hats. But in his position as the headsman of the Elk Horn Society, he stays as one individual today.

Today he is talking up for his allotment and his own land because he has the right as a spokesman for the Cheyenne people. He is not here as a politician. He is here as one of the society leaders, and as the interpreter and as the holder of one of the members of the Elk Horn Society, I wish to interpret, and I wish to inform of what Mr. White Dirt has just said.

Mr. WHITE DIRT. [Speaking in northern Cheyenne].

Mr. LITTLE WHITEMAN. To further respond in behalf of his testimony today, Mr. Melcher, he is also stressing and telling you that he is against this for the simple reason that as a spokesman, he is telling you that he would sacrifice his life if he had to. This is how much he thinks of his own land and how much he thinks of his position and standing with the northern Cheyenne people. He is against what the council is trying to do and you along with it. He is telling you what you are doing is wrong. This is what he is telling you, and he wants you to get the points across.

Senator MELCHER. Is there some feeling that the tribe would like to have the minerals separated from tribal ownership and each allottee then own his own minerals?

Mr. SMALL. Senator Melcher, I think the group of northern Cheyennes that are here, that we at this table are representing this morning, would rather not enter into discussion concerning legal, political, or legislative specifics of this bill at this time. I think we——

Senator MELCHER. I would like an answer to that question because, you know, what we have done here has allowed the tribes to speak for themselves. Now my question is very pertinent. Is there a feeling among the tribal members that they would like to separate individual

ownership of minerals from the tribe and, therefore, go to the individual owners of allotted land? That is a very simple question.

Mr. SMALL. Yes.

Senator MELCHER. Is there that feeling?

Mr. SMALL. Well, I have a very simple answer to that, and it is my own personal answer, and it is: that is a very major decision and one that no particular individual or group can respond to at this point in time.

Senator MELCHER. Well, at this particular time does the tribe still advocate mineral ownership by the tribe for the purposes of the tribe as a whole?

Mr. SMALL. Yes, they do.

Senator MELCHER. Well, that responds, then, to one of the points that was raised. Now will you interpret that?

Mr. LITTLE WHITEMAN. Now, the response is that we are not questioning the mineral rights. We are questioning the surface, rights, the allotted land.

Senator MELCHER. Now, let us get to that point, and the question of legal rights has certainly been raised by the testimony from you people. The agreement that was entered into by the tribe and ARCO was through all the tribe, was it not?

Mr. SMALL. Senator Melcher, would you restate that?

Senator MELCHER. The agreement entered into by the Northern Cheyenne Tribe and ARCO was at the approval of the tribe?

Mr. SMALL. Senator Melcher, the concerns that were registered by the Northern Cheyenne people concerning the ARCO agreement was put before a petition for a referendum which, at this point in time, is subject to a lot of legal clarification. The points that were put forth in the petition for referendum by the people were very different as to what was actually put before a vote of the people. They actually voted on whether they would receive a per capita payment and not really anything specific to the issues that were requested in the petition for referendum. So what I am saying, I guess, is that there are a lot of questions and concerns as to what the people voted on concerning the ARCO agreement, and this group has further asked our tribal council to immediately put out written procedures that would specify how a petition for referendum is conducted on our reservation. At this point in time, that whole process is very ambiguous and needs to be clarified, and a case in point is the ARCO agreement that the people did not vote on.

Senator MELCHER. The petition and the holding or conducting of the referendum was under tribal authority, was it not?

Mr. SMALL. Yes, it was.

Senator MELCHER. So, are you challenging whether it was executed properly by tribal authority or tribal order?

Mr. SMALL. No, I do not think we are. I think that is a moot issue at this point. What we are saying is that there are a lot of legal questions that need to be given a second look when it comes to petitions for referendum on the Northern Cheyenne Reservation.

Senator MELCHER. Well, I think that answers the question as affirmative; yes, you are challenging whether it was done properly.

Mr. WHITE DIRT. [Speaking in Northern Cheyenne.]

Senator MELCHER. Is that correct?

Mr. SMALL. Yes.

Senator MELCHER. That is correct. Then would the remedy be in court?

Mr. SMALL. I would suppose so.

Senator MELCHER. In tribal court?

Mr. SMALL. Yes.

Senator MELCHER. If you were not satisfied there, you could appeal it to the Federal district court?

Mr. SMALL. Yes.

Senator MELCHER. Have you taken such steps?

Mr. SMALL. Well, we have requested our tribal council to produce—establish written procedures for conducting a petition for referendum, and we are hopeful that that will be a cooperative effort which will not have to go before tribal court or courts outside of the reservation, and that is what we are hopeful of and anticipate.

Senator MELCHER. Now was there any coercion by this committee or anybody else in Congress for the Northern Cheyenne to enter into such an agreement?

Mr. SMALL. We cannot answer that, I do not believe, Senator Melcher, at this point in time. I guess what we have is a recommendation that the U.S. Select Committee take a very hard look at arguable potential political abuse of tribal self-determination and sovereignty and just basic rights of people at this point in time. I think what we want to demonstrate today is that there are a great number of Northern Cheyenne people in this room today that are concerned about this bill and about the ARCO agreement, and we just want to register to the U.S. Select Committee that we have some concerns. I think the number of signatures that are on the petition today and the fact that there are people here make that point very clear, and that we would like the same—as the Northern Cheyenne Tribal Council has requested, some time to take a look at these issues and perhaps give additional testimony on March 16.

Senator MELCHER. First of all, let me make it clear; there is no action by this committee or anybody else connected in Congress, that I am aware of, to have anything to do with the terms of the agreement with ARCO. It was between the tribe and ARCO.

Mr. SMALL. OK.

Senator MELCHER. The whole procedure of whether or not that should be done was a tribal affair and did not involve us. Now I assume that there was some money involved. How much was it?

Mr. MCMANUS. The promise, Senator Melcher, was $1,500 per capita to be distributed, and this is what the people of the Northern Cheyenne voted upon for to enter into this agreement. So there is some point of question of coercion, I guess, with that $1,500. The people voted on a $1,500 agreement, and when distributing this $1,500 came about, when the people went to pick up their per capita checks, the amount of money was $1,295.

Senator MELCHER. $1,295?

Mr. MCMANUS. That is right.

Senator MELCHER. How much total was it for the tribe?

Mr. MCMANUS. I really do not know at this point.

Senator MELCHER. How many enrolled members are there?

Mr. MCMANUS. About 4,000.

Senator MELCHER. So it would be likely that it would be about $6 million, then?

Mr. MCMANUS. Somewhere.

Senator MELCHER. Is there any evidence that there was coercion by the Bureau of Indian Affairs, the Department of the Interior, or anybody in Government that signed the contract?

Mr. MCMANUS. We assumed that the Bureau was involved, and——

Senator MELCHER. No. I am not talking about the Bureau being involved. I am talking about any coercion.

Mr. MCMANUS. I cannot say at this point.

Mr. SMALL. Senator Melcher, may I make a comment?

Senator MELCHER. I want to make this clear. This bill does not attempt to get into telling a tribe what they should or should not do on a contract.

Mr. SMALL. Yes.

Senator MELCHER. This bill is intended to give flexibility for such opportunity for a tribe, and the decision is to be made by the tribe. Where minerals are separated and owned by individual Indians, which does not seem to be the case with the Northern Cheyenne, to allow those individual Indians on their own allotted lands, where they own minerals, to have that opportunity, too. Yes, please, Clayton, make your comment.

Mr. SMALL. The Department of the Interior admitted the Secretary of the Interior did not have authority to sign and approve the ARCO agreement, and yet he approved it. The ARCO agreement did not comply with the 1938 Mineral Leasing Act. So it basically, at this point in time, is illegal, and the Secretary did not have the authority to sign off on it. So, if there is any potential litigation between now and the time the passage of the bill takes place, it has the potential to greatly reduce the Northern Cheyenne Tribe's ability to renegotiate this ARCO agreement, especially as it pertains to section 3. So, we are not talking about collusion or political——

Senator MELCHER. Well, a contract is a two-way street, and we are not going to get into this. It is between the tribe and ARCO, and it seems to me what you are saying is you feel that the tribal council used procedures that you do not agree with and perhaps were misleading or were wrong, and in that instance, I would suggest the remedy lies within the tribe itself. Second, you have heard me explain what we think section 3 does. That is open for debate, and that is why we have public hearings.

Mr. SMALL. Right.

Senator MELCHER. But you also heard me say, I think twice, and I will say for the third time, I am very apprehensive of anything that is retroactive. But since contracts are a two-way street, I think you will find that we are going to have to be concerned with having taken whatever it was, $6 million or thereabouts, whether or not the tribe wants to cancel the contract and what the liabilities are that that would incur as found by the court.

Mr. SMALL. Yes. Senator Melcher, I think the group here would fully concur with you that this is basically an internal matter of

the Northern Cheyenne Tribe, and one of the problems that restricts resolving this issue as an internal problem is the limitations concerning due process on the Northern Cheyenne Reservation. As you probably know, there is no separation of powers. Basically we have a situation where the tribal council controls the tribal courts, and one of your questions was, "Well, shouldn't this be resolved in tribal courts?" Because of the lack of due process and separation of powers, that makes resolving this issue at the internal and local level, a very difficult task. I guess, what we would like to convey to you and the committee is that the group here would very much like to resolve this as an internal matter, but we may have some difficulty because of the lack of separation of powers, and we would like to request some assistance from the committee as we proceed with trying to resolve this issue as an internal problem.

Senator MELCHER. Well, you know, I am not going to sit here and give you advice, but I do want to repeat for the record that dissatisfaction with the finding of the tribal court can be appealed to the Federal district court.

Mr. LITTLE WHITEMAN. Mr. Chairman, to conclude our presentation here on behalf of the society, the reason why we made a presentation here is you have councilmen that are pretty young, and do not understand Cheyenne. That is what we are concerned with, him and I, as society members. Another thing, I think the council should be fully expressed right now in saying, "Let's cancel this lease," if they had any backbone. I thank you.

Senator MELCHER. Thank you.

Mr. SMALL. Senator Melcher, thank you. I would just like to restate that we would like the opportunity to present additional testimony, if that is appropriate, on March 16.

Senator MELCHER. This record will remain open, not only to March 16 but after March 16, and if you want to appear in this particular record or prefer to supplement it, that is fine. You have much longer than March 16; at least another 2 weeks after that, until the end of March.

Mr. SMALL. Very good. Senator, we would also like the committee's assistance in collecting the pertinent information relating to the ARCO agreement with the Northern Cheyenne Tribe so that we could review and study that further and perhaps use that as some additional testimony.

Senator MELCHER. I would suggest that since this is between the tribe and ARCO, that you talk first of all to them. I would not know why any data that you want would not be available, but we have none. We have no data on the agreement since it was between a company and the tribe, exercising its authority under self-determination and other acts of Congress.

Mr. SMALL. Very good. I would just like to close by stating that we were very pleased with the testimony given by the Northern Cheyenne Tribal Council representative, Mr. George Hiwalker, Jr., and we feel that even though there were two separate testimonials given by the Northern Cheyenne Reservation, we feel that basically they were saying the same thing, and that we would further like to thank the committee for allowing this group, which is not a recognized group of the

Northern Cheyenne Tribe and does not have any specific ties to the council. for giving us the opportunity to speak, and we want to thank the committee for that.

Senator MELCHER. Well, if this committee had to come to Billings to get the two groups together, it is well worthwhile. Next time we will have you testify together.

Mr. SMALL. Thank you.

Senator MELCHER. Thank you.

Terry Knight, chairman of the Ute Mountain Ute Tribal Council. Please proceed.

STATEMENT OF TERRY KNIGHT, CHAIRMAN, UTE MOUNTAIN UTE TRIBE, TOWAOC, COLO.

Mr. KNIGHT. Good morning, Senator. I am Terry Knight, chairman of the Ute Mountain Ute Tribe, located in the southwest corner of Colorado.

I would like to thank you for the opportunity to testify today on Senate bill 1894, which would allow Indian tribes to enter into alternative forms of agreement for energy resource development. The Ute Mountain Ute Tribe is particularly interested in this legislation as we are just beginning to move forward with the development of our energy resources after a 12-year nondevelopment period. We now hope to enter into more comprehensive agreements which would provide longer lasting benefits than the standard lease form.

The history of Government protection of tribal resources reflects an overabundance of control and a failure to take advantage of opportunities due to being shortsighted in approach. An example of the Government's past attitudes towards leasing tribal lands for the benefit of Indians is reflected in a portion of a Department of Justice opinion issued in 1885. It states:

> Our government has ever claimed the right, and from a very early period, its settled policy has been, to regulate and control the alienation or other disposition by Indians, and especially by Indian nations or tribes, of their land. This policy was originally adopted in view of their peculiar character and habits which rendered them incapable of sustaining any other relations with whites than that of dependence and pupillage. There was no other way of dealing with them than that of keeping them separate, subordinate, independent, with a guardian care thrown around them for their protection.

While we have come a long way since this opinion was issued, the underlying protectionism still exists, and it exists to the detriment of the tribes. As trustee, the Federal Government should not just protect tribes, an approach that represents a negative policy, but rather should take a broad positive approach to energy development, which consists of vigorously looking for the best opportunities for tribes. A conservative, protection-oriented approach to energy development in today's world cannot provide tribes with the best return for their resources. Therefore, the Federal Government cannot properly serve its role as trustee by taking this approach.

25 U.S.C. 396, the current oil and gas leasing statute, is an example of a conservative approach by the trustee which is inadequate. While the competitive bidding process and standard lease forms provide a workable administrative system for approving leases, it does not pro-

vide the opportunity to create an agreement which truly responds to the tribes' needs. It may bring money, but little else. A 10-year limit on leases is too inflexible to provide the opportunity for creative deals.

While the current status provides an out by allowing the Secretary of the Interior to reject all bids and approve the negotiated agreement, this approach is not commonly used by the BIA. This type of negotiated approach is subject to court challenge and is loaded with practical problems. In short, the present statute, while well-intentioned, will not suffice today as tribes need greater flexibility when negotiating their agreements to develop tribal energy resources.

We feel that Senate bill 1894 provides that needed flexibility. Under this bill, agreements can be structured to provide higher royalty and lower up-front money. The tribes can enter into agreements which include profit sharing instead of or in addition to royalties. Sliding scale royalties can also be provided.

Specific work programs for exploration and development can be included. Programs can be established to provide education and training for tribal members. A tribe can demand a specific number of jobs at a specific pay scale and require contracting of tribal businesses to provide services such as road maintenance, fence building, and security patrols.

The term of the lease can be extended or limited, depending on the rate of return to the tribe at a particular point in time.

Grants to the tribe to assist with specific programs, such as establishing an energy office with computer monitoring capabilities, can be included in an agreement. Environmental standards can be specifically set forth in an agreement. In many cases, tax savings can be realized through alternative forms of agreement, such as joint ventures. These tax savings will develop a greater return to the tribe. Lastly, tribes can exercise more management control over development of reservation resources.

In short, Senate bill 1894 would provide greater flexibility which would result in greater return to the tribe, not only in money but in many other areas.

The Ute Mountain Ute Tribe needs this greater flexibility as soon as possible so we can proceed with meaningful negotiations to develop our energy resources. The interest of the oil companies has been expressed. What is missing now is the legislation to allow the proper form of agreement.

Before I conclude, I have some specific comments on Senate bill 1894. On page 2, lines 3, 4, and 5, the bill states that, "Any such agreement shall be for such term and be subject to such conditions as may be prescribed by the Secretary by regulation." We are concerned that the Secretary may set an arbitrary time period for agreement or impose other restrictions which may defeat the purpose of this legislation. The flexibility must be maintained and cannot be hampered by regulatory limitations. Also, the Secretary should be able to issue a conditional approval if the agreement is basically favorable but requires some specific changes to benefit the tribe.

We suggest 90 days instead of 1 year for approval of agreements by the Secretary. As the BIA should be working with the tribe all along, this should provide sufficient time to make a decision. We feel

that the tribe should have 60 days to appeal from an unfavorable decision by the Secretary. There should also be an intermediate appeal as presidential review is likely to be a cumbersome process. Access to the courts should be allowed if all administrative appeals are unsuccessful. Finally, a definition of "Indian tribes" should be included in the bill.

I hope my comments to you are helpful. We feel that the time has come to provide tribes with the opportunity for long-range economic development through the negotiations of alternative forms of agreement for energy development. Some tribes may elect to continue under the current system, and we do not propose eliminating this option. But, at the same time, we cannot be denied the opportunities that more progressive forms of agreement can bring to us.

With that, Senator, I would like to thank you for the privilege of giving me the opportunity of testifying before the committee. That is all of my testimonial. If you have any questions, I will be happy to try to answer them.

Senator MELCHER. If the tribe has an agreement and then makes a proposal to the Secretary that he review it for adequacy under his trust responsibility, the question of shortening the 1 year's time has to do with the requirement for the Secretary to have an environmental impact statement. Since his decision would be a significant Federal decision, we feel that an EIS, in most instances, will be required. Getting one done in less than 1 year would be a modern miracle.

That is why the year is in there, in that the Secretary actually needs a year to review the terms of the contract to see whether it is good. It is also a question of whether the Secretary can comply with the laws that he must comply with in exercising that authority, and one of those in the environmental impact statement, if it is a significant Federal decision. I do not know how we can shorten it because we do not think an EIS will be completed in 1 year's time, in many instances.

Mr. KNIGHT. There is not any possibility that we could have an EIS before we get to that?

Senator MELCHER. I think it should be before. I think the tribe has asked for one.

Mr. KNIGHT. This has been the case with our experience, that the environmental impact statements have been prepared before we ever got into the negotiating process or where we are going to have to present our papers to the Secretary for approval. Whether that has been the case with the other tribes, I could not say, but this has been our experience.

Senator MELCHER. It has been very slow, and in this specific instance, unless it is clearly known what is going to be the decision of the tribe in the contract, it is rather difficult to cover all the bases in an environmental impact statement. One of the features of an environmental impact statement is that other economic alternatives be reviewed. That is part of a requirement of the law, and so you just about have to know what is being presented by the tribe to be able to look at all the features of an environmental impact statement. Frankly, I think the tribe would want to know, too, what impacts might result from the contract before the tribe signs off on the agreement itself. It is a little bit difficult to hasten these procedures. We will re-

view, as best we can, how it can be done as expeditiously as possible but still comply with all the law that is involved, including environmental impact statements.

Thank you very much.

Frank K. Blackard, mine manager, Northern Powder River Basin, and John Irvin, manager, public affairs, mining, Shell Oil Co. Please proceed, Mr. Blackard.

STATEMENT OF FRED K. BLACKARD, MANAGER OF MINE DEVELOPMENT FOR SHELL OIL CO., NORTHERN POWDER RIVER BASIN

Mr. BLACKARD. Senator Melcher, my name is Fred K. Blackard, and I am here representing Shell Oil Co. I am currently the manager of mine development for our Northern Powder River Basin properties, and this includes responsibility for our proposed coal development on the Crow Indian Reservation.

We appreciate the opportunity to present our views concerning Senate bill 1894.

As you no doubt know, Shell has historically been essentially an integrated oil and gas company. Approximately a decade ago, however, we initiated effort to become a major coal producer, and we are making substantial progress in that direction.

As a producer of oil, gas, and coal, we have frequently done business on Indian reservations. At the present time we hold oil and gas leases on approximately 20 reservations across the country. In addition, we have a lease for the development of coal on the Crow Indian Reservation. This lease was originally executed in 1972, has subsequently been renegotiated, and was submitted again for Secretarial approval. We are currently awaiting final Secretarial approval subject only to completion of an environmental impact statement.

We believe that in the 1980's, the United States has the opportunity to make decisions and take actions that will tend to help our country become more energy self-reliant and thereby reduce our heavy dependence upon imported oil. Our view is that principally this involves developing our own energy resources and using energy more wisely. The key element in this, however, we believe, is the development of this country's oil, gas, and coal, for these must serve as the bridge to a wider range of energy sources in the future.

Indian tribal energy resources are a very important part of our domestic energy resources. According to information published by the Council of Energy Resources Tribes, American Indian tribes are the owners of approximately one-third of our country's Western low-sulphur strippable coal, about 15 percent of the entire country's coal, and about 4 percent of our oil and natural gas. It is obvious that the timely and proper development of these resources is essential for the long term energy self-sufficiency of our country.

To facilitate this development, we believe that Indian tribes and owners of these vast resources should have the flexibility to negotiate and execute agreements which they find attractive enough to cause them to continue to bring their resources to the marketplace. When this happens, all parties involved; the Indian tribes, industry, and our country, will benefit.

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Allowing this flexibility is consistent with the objective of maintaining the right balance between the appropriate constraints required by the Government's trust responsibility toward Indians, and the needs and desires of the various tribes to develop their energy resources in the way which best meets their needs. We believe that the current statutory scheme errs toward the side of too much constraint, and that Senate bill 1894 would help to restore the proper balance.

So as a general proposition, Shell supports the passage of this bill. We believe, however, that a few minor adjustments in the language might be appropriate, and I would like to respond to some particular circumstances that cause us to reach this conclusion.

Our support of this bill arises principally out of our experiences in the renegotiation of the coal lease with the Crow Tribe of Indians and the lessons which we see in that for our future business relationships with Indian tribes. That lease agreement, which I referred to earlier, was renegotiated over the period of years from 1975 to 1980. The perception of those of us who were involved in it was that this was a period of significant change in the attitudes and thinking of many people within the Crow Tribe, and probably many people of other tribes as well.

Our feeling and our perception was that the Crow were becoming aware of the value of their resources, more aware of the various alternative methods available to them for developing energy resources, and more aware of the expertise which was available to advise them. They recognized the value and appropriateness of a traditional lease under many circumstances, but they also recognized that under other circumstances, and particularly as they developed more of their resources in the future, other forms of agreement might better fit their needs. Thus in our negotiations, the interests of the tribe, we felt, could hardly be met with a traditional lease alone.

On Shell's part, our interests were fairly simple. We were interested in an investment opportunity that offered the likelihood of a fair return on our investment with an acceptable risk. The form of the agreement was not a major concern to us. We were prepared to enter into types of agreement other than a traditional lease.

After extended negotiations involving a multitude of issues, we arrived at an agreement which we feel is in the best interest of both parties. we agreed to basically a lease arrangement under which the Crow Tribe could elect in the future to enter into a joint venture agreement with Shell in the production of coal in certain parts of the leased area.

This was the type of agreement that businesses generally enter into on virtually a daily basis, and yet, in our case, because of the generally restrictive and frequently confusing nature of Federal legislation relating to these matters, both parties felt compelled to include a provision covering the possibility that the Crow Tribe is, in fact, precluded from participating in such a joint venture.

If, as a matter of fact, the tribe cannot be a joint venture partner, they will have lost an opportunity to become an equity partner in the development of this part of their resource. Perhaps more importantly, future attempts between the tribe and industry to develop agreements will be more difficult, because the parties will have fewer opportunities for innovative and mutually beneficial business arrangements.

We believe that the lessons learned here apply as well to other types of energy operations, to other Indian tribes, and to other forms of agreement. While we believe that leasing of minerals may in many cases be in the best interest of both parties, it is also true that in other cases all parties are better off if resource owners and developers can sit at the negotiating table and engage in arms length negotiations under the full range of opportunities available in normal commercial relationships. We believe that the passage of a form of Senate bill 1894 will substantially accomplish this, without infringing upon the obligations of the Secretary of Interior as trustee for Indian tribes.

I mentioned earlier that we have a couple of suggestions where we might suggest some minor changes in the language. We would recommend the following.

Section 1(a) provides that "any such agreement shall be for such term and be subject to such conditions as may be prescribed by the Secretary by regulation." I would like to echo some of the earlier statements to the effect that we believe that in many cases, imposition of restrictive regulations may be as much of a detriment to innovative agreements as a restrictive statute. So we would encourage consideration of the view that these regulations be limited to providing secretarial approval which would give the parties greater ability to develop what is in the best interests of the parties. This approach would allow for innovative agreements which meet the needs of the parties and still maintain trust responsibility over them.

Another very minor point that we would make is that section 1(b) provides that upon disapproval of a tribal proposal by the Secretary, the tribe may obtain a Presidential review. As we see it, this type of an agreement is a two-way street, and it would seem reasonable that before such agreement goes to presidential review, both parties would consent to it, and we suggest a change accordingly.

For Shell Oil Co., I would like to thank you for this opportunity to participate and to present these views in favor of Senate bill 1894.

Senator MELCHER. Well, your first recommendation, Mr. Blackard, just tracks what Terry Knight of the Ute Mountain Ute Tribal Council said, and your second one, I believe, is well taken, also. Both are well-made points. If we are going to have a review after a wait of a year or so, maybe both sides ought to be interested in the review.

Thank you very much.

Mr. BLACKARD. Yes. sir. Thank you.

Senator MELCHER. Donald Stewart, chairman, Crow Tribal Council.

STATEMENT OF TED HOGAN, SECRETARY OF THE CROW TRIBAL COUNCIL, ACCOMPANIED BY ELOISE PEASE AND ARTHUR BIGMAN, MEMBERS OF THE CROW TRIBAL COUNCIL, CROW AGENCY, MONT.

Mr. HOGAN. Senator Melcher, I am Ted Hogan, the secretary of the Crow Tribe. Donald Stewart could not be here, and we thank you for the opportunity to speak to the committee.

Senator MELCHER. Please identify the other witnesses.

Mr. HOGAN. This is Eloise Pease and Arthur Bigman, both members of the tribal council.

We appreciate this opportunity to talk, and I am sure you appreci-

ate us being here, also. We support Senate bill 1894 because of the fact that I think it is time that the Indian nations are somewhat controlling their own destiny, and because of our vast resources in gas and oil, bentonite, and coal, we feel that Senate bill 1894, or something like this, is a long time coming.

One of the things that I want to stress is that we are under the scrutiny of the Bureau of Indian Affairs on this. Presently, I feel that the Bureau of Indian Affairs is unfairly pressuring the tribe to cut down the economic benefits to its members by the recent Inspector General's report that we ordered to come into our reservation to conduct an audit. I think, as a part of the coverup for their mismanagement, the Bureau of Indian Affairs is unduly pressuring the Crow Tribe to submit most of its funds coming in to cover these audit deficiencies. For instance, the BIA last year approved somewhat over $400,000 over the budget of money that was not forthcoming within that year, and now the entire Crow Tribe and its members are suffering for that.

The Senate bill is good. I just want to state that if the Crow Tribe should come into any kind of agreement in a sale or owning their own coal or energy development corporation, that the Bureau of Indian Affairs exercise their trust responsibility in helping us obtain that goal rather than becoming a stumbling block in the process. We have some comments on the Senate bill, and I will turn it over to Eloise Pease now for some of our short-range and long-range projects.

Senator MELCHER. Eloise?

Ms. PEASE. Thank you, Ted. Thank you, Senator Melcher, and I first want to compliment you on holding this hearing and on some of the other recent hearings that you have held. I think that this is a wonderful opportunity that you provide to Indian people as a forum to express our concerns, and this proposed bill, S. 1894, is another example of your continued concern about Indian people.

On January 9, 1982, the Crow Tribe gave preliminary approval to constructing a coal-fired electric powerplant and is presently studying the feasibility of constructing a synfuel plant to produce synthetic natural gas from coal. These proposed developments should help to alleviate the Crow Tribe from complete dependence on Government subsidies and will bring economic independence to the Crow people. Proposed Senate bill 1894 will be the needed catalyst to further this economic planning, and it will make possible the tribe's desire to operate their own coal mine, to contract for coal development on their own terms, and thus reap the economic benefits of ownership rather than maintaining the continued status as a lessee.

The Crow Tribe, though, offers one suggestion to your bill. On page 2 at the end of line 3, rather than a period we would like to suggest that a comma be inserted and the following words be inserted: "and Indian tribes shall be permitted to establish federally chartered corporations with the approval of the Secretary of the Interior." We realize that you have some wording here similar to that, but it does not definitely allow us to have a federally chartered corporation. We think that this is a very real need. Senator Melcher, the Crow Tribe is not an IRA tribe. Therefore, we have no method at our disposal to be a responsible owner-operator of our coal production since we do not have a method to establish a viable corporation. This wording would assure us the badly needed chance to develop our minerals for the maximum

good of our people and to establish ourselves as first-class citizens for this great Nation.

Again, may I thank you on behalf of the Crow Tribe for this opportunity to have some input into this bill. We in Montana are fortunate to have you as our Senator in Washington.

Thank you.

Senator MELCHER. Thank you.

Ms. PEASE. I think Mr. Bigman wanted to make a statement.

Senator MELCHER. Mr. Bigman?

Mr. BIGMAN. I just want to state the fact that I think that 1-year term you put in in 1894 will help us, but we would like to have the resource produced as we lease it out for a period of 90 days or something like that to benefit the Crow Indian Tribe. This way we are broke. In other words, we have to wait for a period of 1 year. Then we won't—we will be broke for the rest of our lives. We have minerals. We are mineral rich, but still we ceded our reservation since 1920. They took oil land, and we never did cede. Never did have nothing. You go on the reservation; the only thing you could look at is new houses there. We are still paying for those houses. We still owe for those houses. All the things that we have; we are mineral rich. Still, we would like to have that thing come down a little bit more, to 6 months or something like that.

Mr. HOGAN. In closing, Senator, we are in a position now where we are aware, as Mr. Blackard said, from Shell Oil, we have a lot of front-end people and all the people who are aware now of the value of our mineral assets, and we would like to somewhat control our own management and our own production. Another thing, with these big conglomerates, big oil energy companies and so forth, one of their major interests is to come out and tie up your mineral assets in leases for a long period of time. This would give us some flexibility to develop our own proposals and deal with these people more for the benefit of the 6,500 members we have in our tribe.

If you have no questions, Senator——

Senator MELCHER. I just have one comment. The suggestion that a federally chartered business corporation be allowed as one of the opportunities seems to me to have a great deal of merit. Certainly we will give that a lot of thought, and as one of the options that would be available to a tribe, because there are probably instances where that would be advantageous for the tribe.

Mr. HOGAN. One of the things that also is being done, probably not by you, but by a lot of people that do not really know the Indian world is that just about every tribe or every nation is unique, and there are some under the Indian Reorganization Act, and there are us that have a treaty with the U.S. Government.

Senator MELCHER. Thank you. Thank you all very much.

Ms. PEASE. Thank you, Senator.

Senator MELCHER. Gilbert Harrison, associate director for energy development, Navajo Tribe. Is Mr. Harrison here?

STATEMENT OF GILBERT HARRISON, ASSOCIATE DIRECTOR FOR ENERGY DEVELOPMENT, NAVAJO TRIBE, WINDOW ROCK, ARIZ.

Mr. HARRISON. Good morning, Senator, and thank you very much. Senator Melcher, ladies and gentlemen, self-determination and self-

sufficiency are two popular phrases in use among the Indian nations today. These concepts are very important to the survival of Indian people, and, however, to achieve these goals, certain basic and essential actions must be taken in partnership between the Indian nations and the U.S. Government. In many instances, these steps are nothing more than affording equal treatment to Indian nations by allowing the nation's eligbility and enjoyment of those privileges which are enjoyed by corporations, governments, and other citizens of the United States on a daily basis.

A number of Indian nations have been blessed with abundant energy resources. Unfortunately, in many cases these resources have been squandered by agreeing unknowingly to unfair leases. As we all know, the Bureau of Indian Affairs, as our trustee, has been a part of this giveaway program. Today many Indian nation governments are stable, responsible, and sophisticated to a point where they can best determine how to utilize the remaining resources on their lands to receive maximum returns.

In the last decade, the Navajo Nation has upgraded its internal capacity to plan, evaluate, and develop various energy projects. These projects are more favorable in providing overall positive economic return to the Navajo people. No longer is the Navajo Tribe satisfied with the old standard Federal leases which only emphasized and relied upon royalty return. New concepts which could be formalized will address alternate forms of agreements keyed to the assumption of control and efficient development of its energy resources, and these agreements will pay a higher return to the Navajo Tribe.

In talking about maximum returns, we are looking toward applying a concept known as vertical integration to energy projects, where transference of management and technological expertise to the Navajo people can be a reality. Preference in Navajo employment and business opportunities can be realized. A strong Navajo economic development could be the result.

To achieve the goals which we have set for ourselves, the Navajo Tribal Council adopted the Navajo energy policy in April 1980 which is attached. The policy is a balance between energy development and its social impact between the future and our current needs, between energy needs of the Navajo Nation and our neighbors.

To carry out the development policy, the Navajo Energy Development Authority, NEDA, was so created by the Navajo Tribal Council in May 1980. The express purpose of NEDA is to be a development organization for the Navajo tribal government. However, NEDA cannot function under the present leasing-only policy promoted by the Bureau of Indian Affairs. NEDA must be afforded the opportunity to enter into joint agreements, partnerships, joint production, risk services, management, and operating agreements to achieve its goals.

Therefore, the Navajo Tribal Council, realizing the importance and timeliness of Senator John Melcher's Senate bill 1894, "Alternate Forms of agreements for Indian tribal minerals development," has passed a resolution, unanimously, in support of and recommending the enactment of the proposed Senate bill 1894.

To a certain extent, the allowance of Indian nations to enter into various forms of agreements is only a partial answer. As is well known,

securing financial resources for developing energy projects is another big obstacle. Therefore, we would also encourage the members of the Senate Select Committee on Indian Affairs to support the enactment of Senate bill 1298, "Indian Tribal Government Tax Status Act," now pending before the U.S. Congress, which would afford the tribes the same opportunities and advantages as those given to States, cities, and municipalities to raise money for various projects.

Certainly the bills together would be a major step in bringing about true self-determination and self-sufficiency to the Indian nations.

I thank you. Any questions?

Senator MELCHER. When was this tribal resolution passed?

Mr. HARRISON. The tribal resolution supporting the Senate bill was passed February 5, 1982.

Senator MELCHER. Just recently, then?

Mr. HARRISON. Right.

Senator MELCHER. There are not any joint ventures or similar contract arrangements between the Navajo and some companies?

Mr. HARRISON. No, Senator. We do have two of them which are in the various stages of negotiation.

Senator MELCHER. Is it practical to start an environmental impact statement during that time frame?

Mr. HARRISON. Senator, our experience has been that the environmental impact statement cannot be completed until such sites have been identified so that you can do the sites specific. Therefore, it is a little later down the line.

Senator MELCHER. Thank you very much.

Mr. HARRISON. Senator, I would like to add one more item here which we did not mention but which is very important and maybe your staff and Senate Select Committee can consider. In talking with various energy corporations and other people about forming a joint venture or some sort of an operating agreement where we do not actually transfer the ownership rights to our minerals, a problem we have come across is the definition of the term "economic interest" which allows a corporation to use depletion allowance in determining their Federal income tax and cash flow. Now we have run into quite a bit of problems because the corporations are saying if we do not have a lease and if we do not have a clearly defined economic interest in the energy resources, we cannot use depletion allowance in calculating our Federal tax credits or tax deductions. So I think that is another very important issue which should be resolved soon, because I think it is no different than some laws such as the Safe Harbor Act as defined in the Economic Recovery Tax Act of 1981, which allows the transfer of certain tax deductions between corporations. So I think that would be another appropriate concept which should be addressed and resolved.

Senator MELCHER. That is a very good point. We should address it because it will make a great deal of difference.

Mr. HARRISON. Absolutely, because it does make a difference in the cash flow analysis and in drafting partnership agreements.

Thank you very much.

Senator MELCHER. Thank you very much.

The resolutions will be made a part of the record at this point.

[The resolutions follow:]

CF-9-82
Class "C" Resolution
No BIA Action Required.

RESOLUTION OF THE
NAVAJO TRIBAL COUNCIL

Supporting U.S. Senate Bill 1894, Entitled
"Alternate forms of Agreements for Indian
Tribal Minerals Development"

WHEREAS:

1. The present legislation limiting development of energy and mineral resources located on Indian lands to leasing only unduly restricts tribal autonomy and does not provide sufficient incentives to spur development of such resources; and

2. Legislative reform of the present system enabling the tribes, as mineral owners, to determine the form of development arrangement which is in their own best interest and empowering them to negotiate directly with developers in the same manner as do all other resource owners both enhances the economic and social conditions of the tribes and aids in the achievement of domestic energy self-sufficiency by encouraging development of tribal energy and mineral resources; and

3. The enactment of Senate Bill No. 1894, which was introduced on November 30, 1981, by Senator John Melcher of Montana would remedy the limitations inherent in the present system and promote both tribal autonomy and the development of Indian resources; and

4. The present legislative regime limiting development of energy resources on tribal lands to traditional lease arrangements, entered into pursuant to the Omnibus Indian Mineral Leasing Act of 1938, discourages desired investment in the resources located on Indian lands and thus prevents Indian tribes from realizing the maximum economic and social benefits which would ordinarily flow from the development of such resources; and

5. This continuing restriction to the disposition of mineral interests solely by lease is, today, inconsistent with both recent developments in the energy and mineral sectors and with the concept of tribal autonomy. Such concept requires that the tribes be offered the same opportunities to exercise significant options in management, profit, capital, resource and risk participation as are available to all other mineral owners; and

6. Excessive regulation under the present system inhibits energy and mineral development on tribal lands because of the high transactional costs associated with the obtaining of mineral rights

to Indian lands. As a consequence, tribal energy resources are underutilized to the detriment of both tribal and national economic and energy goals. Only by allowing increased flexibility for both the tribes and the private sector to negotiate the types of modern, innovative agreements that are in their mutual interests can production from tribal lands be maximized with a minimum of social disruption to the tribes; and

7. Innovative energy development arrangements, including joint ventures, operating agreements, risk services agreements and managerial agreements, which provide for carried working, net profits or other interests would be permitted under S. 1894 and would provide Indian tribes a greater participation in the profits derived from their benefit through a greater assurance of access to resources; and

8. Prompt legislative action is needed to provide the Secretary of the Interior clear authority to consider the non-traditional agreements which are now pending or under negotiation and to ratify those non-traditional agreements which have heretofore been concluded; and

9. Subject only to modest changes to ensure more fully, (1) direct tribal involvement in negotiating the type of agreement that is in each tribe's best interests, and (2) a smoother transition from the 1938 Act lease limitations to a broader negotiating authority, S. 1894 would provide the vehicle necessary to permit the negotiation of innovative energy agreements. It thus has the full support of both Indian tribes and the private sector. Its enactment is critical to ensure a vitally-needed nationwide development of energy and mineral resources located on Indian lands.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Navajo Tribal Council strongly supports U.S. Senate Bill S. 1894 and urges the Congress, and particularly its individual members who represent the various Indian Nations, to enact the measure without delay for the detailed reasons listed above.

2. The Navajo Tribal Council strongly requests that the Bureau of Indian Affairs and the Department of the Interior to fully support U.S. Senate Bill, S. 1894.

3. The Navajo Tribal Council authorizes the Chairman, Navajo Tribal Council, to do all things necessary and legal to ensure the enactment of U.S. Senate Bill, S. 1894.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 54 in favor and 0 opposed, this 5th day of February, 1982.

Chairman
Navajo Tribal Council

CF-10-82

Class "C" Resolution
No BIA Action Required.

RESOLUTION OF THE
NAVAJO TRIBAL COUNCIL

Supporting U.S. Senate Bill 1298, Entitled,
"Indian Tribal Governmental Tax Status Act"

WHEREAS:

1. The Navajo Tribal Council and other Indian tribes exercise extensive governmental authority within their reservations, to design and implement programs to build healthy economics, capable of providing goods, services and jobs needed by their people; and

2. The Internal Revenue Service affords certain tax benefits to states and their political subdivisions which allows the states and their political subdivisions to build and sustain healthy economics, and provide essential services to their people; and

3. Recent federal cutbacks have placed additional financial burdens on tribal governments and that these tribal governments must find means to sustain their governmental obligations to their members; and

4. Certain revisions to the U.S. Internal Revenue Service, Code of 1954 are needed, to provide equal tax treatment (as afforded to state governments) of Tribal governments and that these revisions will strengthen tribal governments and enable tribal self-determination.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Navajo Tribal Council strongly supports U.S. Senate Bill, S. 1298, entitled, "Indian Tribal Government Tax Status Act", and urges the Congress, and particularly its individual members who represent the various Indian nations, to enact the measure without delay, that this bill would provide equal treatment of Indian tribes by Internal Revenue Service, by allowing that:

A. Any person(s) or business entity paying taxes imposed by the Navajo Nation would be entitled to deduct the sums paid from their federal income tax returns.

B. Any person(s) or other entity who donate gifts of cash and other valuable property to the Navajo Tribal government that this contribution would be deductible for federal income, estate and gift tax purposes.

C. The Navajo Tribal government be exempted from a number of excise taxes, including but not limited to, those on special fuels, highway use and telephone services.

D. The Navajo Tribe would be able to offer section 403 (B) tax-deferred incentives to certain employees whose skills and experience are necessary to ensure quality tribal self-government.

E. Allow the Navajo Tribe to offer and issue bonds, municipal and industrial, which would be exempted from taxation.

2. The Navajo Tribal Council strongly requests that the Bureau of Indian Affairs and the Department of the Interior to fully support U.S. Senate Bill, S. 1298.

3. The Navajo Tribal Council authorizes the Chairman, Navajo Tribal Council, to do all things necessary and legal to ensure the enactment of U.S. Senate Bill, S. 1298.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 58 in favor and 0 opposed, this 5th day of February, 1982.

Chairman
Navajo Tribal Council

CMY-39-80

Class "B" Resolution
Area Approval Required.

RESOLUTION OF THE
NAVAJO TRIBAL COUNCIL

Establishing a
Navajo Energy Development Authority

WHEREAS:

1. The Advisory Committee of the Navajo Tribal Council by Resolution ACAP-41-80 recommended the implementation of the Navajo Nation Energy Policy through the creation of the Navajo Energy Development Authority; and

2. The Economic Development and Planning Committee and the Resources Committee of the Navajo Tribal Council, on the 24th day of April, 1980, recommended implementation of the Navajo Nation Energy Policy through the creation of the Navajo Energy Development Authority; and

3. The Navajo Tribe owns vast energy resource deposits, some of which are currently being developed by non-Navajo enterprises for the benefit of non-Navajos; and

4. Past experience has demonstrated that the best way for the Navajo people to guarantee full participation and control of resources development is through resource development by Navajo owned and operated enterprises; and

5. The implementation of the Navajo Nation Energy Policy is the first, and foremost, priority of the Navajo Tribal Council.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Navajo Tribal Council hereby charters and establishes the Navajo Energy Development Authority (NEDA), for such purposes and with such powers as are set forth herein or as may hereinafter be established for NEDA by the Advisory Committee, Navajo Tribal Council.

2. The purposes for which NEDA is established are as follows:

a) To provide an organization owned by the Navajo Nation which can develop and manage energy resources and operate as a profit-making organization of the Navajo Nation pursuant to future agreements between NEDA and the Navajo Nation.

b) To see to it that energy development within the Navajo Nation is carried on consistent with existing and future Navajo Nation environmental, labor, and resource utilization policies.

c) To optimize financial returns to the Navajo Nation from the development of depletable resources, such that the financial returns may be used by the Navajo Nation (through the Navajo Tribal Council) for the development of Navajo renewable resources, productive enterprises, and other long term needs and goals of the Navajo people and the Navajo Nation.

3. The general powers which NEDA shall have are:

a) To enter into agreements with the Navajo Nation for the development of resources of the Navajo Nation.

b) To borrow money and pledge or otherwise encumber its assets to secure the fulfillment of its obligations.

c) To employ such staff as may be necessary to carry out its operations.

d) To enter into contracts and agreements.

e) To make application to federal, state and local governments for participation in such government programs as may be of benefit in implementation of NEDA activities.

f) To establish offices for the transaction of business.

g) To sue and be sued in the courts of the Navajo Nation in the name of the Authority.

h) To be governed by a Board of Directors.

i) To have such powers as may be necessary and proper to carry out the purposes for which NEDA is established, as such purposes may be modified from time to time by the Advisory Committee of the Navajo Tribal Council.

4. Within ninety (90) days from the approval of this resolution, the Chairman, Navajo Tribal Council, shall:

a) Submit to the Advisory Committee, Navajo Tribal Council for approval, the detailed Plan of Operation of NEDA.

b) Submit to the Budget and Finance Committee, Navajo Tribal Council, a proposed first year budget for NEDA, together with a summary of future financial needs, sources of funding, and a business plan.

5. Within ninety (90) days after approval of the NEDA Plan of Operation by the Advisory Committee, Navajo Tribal Council, the Chairman, Navajo Tribal Council, shall submit to the Navajo Tribal Council for approval a detailed report on the progress made to implement NEDA.

6. Notwithstanding the other provisions of this resolution, NEDA shall have no authority to encumber trust or fee land owned or held by the Navajo Nation to satisfy its liability out of the assets or property of the Navajo Nation, nor to waive the sovereign immunity of the Navajo Nation.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 51 in favor and 4 opposed, this 1st day of May, 1980.

Vice Chairman
Navajo Tribal Council

CAP-34-80
Class "B" Resolution
Area Approval Required.

RESOLUTION OF THE
NAVAJO TRIBAL COUNCIL

Establishment and Adoption of the
Navajo Nation Energy Policy

WHEREAS:

1. The Advisory Committee of the Navajo Tribal Council by Resolution ACAP-41-80 recommended the establishment and adoption of the Navajo Nation Energy Policy; and

2. The Economic Development and Planning Committee and the Resources Committee of the Navajo Tribal Council on the 24th day of April, 1980, recommended the establishment and adoption of the Navajo Nation Energy Policy; and

3. The Navajo Nation is not only a principal supplier of crucial energy resources critical to the development of the United States economy, but also bears a disproportionate share of the often irreversible social costs of environmental disruption; and

4. It is clear that other sovereigns are the principal tax and income beneficiaries of Navajo cooperation and resources contribution, and these benefits not only exceed the Navajo share of its own non-renewable resources, but the Navajo people receive little benefit from this transfer of wealth to other sovereign entities, leaving the Navajo Nation in a state of technological and economic poverty; and

5. While the Navajo Nation is a great energy producer, with some of the largest coal mines in the United States, and large electrical generating plants located on, but not owned by the Navajo Nation, many of our own people lack adequate water, electricity, paved roads, employment, housing, and other social and economic opportunities; and

6. The Navajo Nation must rely on its own resources, its own people, and its own will and determination to develop its own land and energy resources for the full economic use and benefit of its present and future generations; and

7. The United States is currently facing an "Energy Crisis" due to the insufficient supply and production of oil and gas to meet demands, and it is apparent that existing reserves will be exhausted within a few years at the current level of consumption; and

8. The history of relations between the Indian people and non-Indians has shown that whenever Indian people have something valuable (land, water, gold, oil, gas, coal, etc.); legal, moral, and ethical obligations are ignored and the virtual confiscation and exploitation of Indian resources takes place; and

9. The Navajo people historically have come to the aid of the United States in times of national emergency, and yet America has not reciprocated by permitting the Navajo Nation to share equitably in America's wealth; indeed, it has not permitted the Navajo Nation to share in a fair portion of its own energy resources.

NOW THEREFORE BE IT RESOLVED THAT:

1. For the purpose of gaining control over the Navajo Nation's energy resource management and development; to assure optimal returns and equity to the Navajo people from energy resource development and to invest in economic development ventures which will replace benefits derived from depleting resources, thereby diversifying the economy; the Navajo Tribal Council hereby establishes the following as the Navajo Nation Energy Policy:

a) All energy resources of the Navajo Nation belong to the Navajo Nation. Navajo energy resources shall be developed to meet the present and future needs and for the full use and benefit of the Navajo people;

b) The Navajo Nation shall become self-sustaining with respect to energy by 1990;

c) All development shall be consistent with the highest standards of resource conservation and environmental protection; while taking into consideration and respecting the sacred nature of Navajo lands;

d) The Navajo Nation shall maximize proceeds from energy resource development and take immediate steps to secure a more equitable share in its present agreements;

e) As a sovereign government, the Navajo Nation shall exercise its right to receive all benefits from energy related federal legislation, regulations, and direct appropriations;

f) The Navajo Nation shall cause the efficient utilization of its own resources through Navajo-owned and controlled enterprises and ventures,

emphasizing a development policy which promotes Navajo self-reliance, so that Navajo people have sufficient energy resources to meet their needs;

g) In the course of using outside management, technical and financial assistance; contracts and agreements shall emphasize Navajo ownership and the transfer of technology and management to the Navajo people;

h) Adverse results from resource development shall be minimized and mitigated whenever and wherever possible and the resulting costs shall be borne by the developer of the resource;

i) Recognize the special legal position and community needs and interest of the Eastern Navajo Agency, including the communities of Ramah, Alamo, and Canoncito;

j) The interests and need of energy impacted Navajo communities shall be considered in all resource development and appropriate steps shall be taken to assure that all chapters and communities share from the benefits from the development of energy;

k) The administration shall provide for the systematic and maximum utilization of its organizational bodies and staff resources in the development, review and evaluation of proposals and its associated documents;

l) The Navajo Nation, in the event of infeasible (high technology) projects, encourages alternative low technology energy resource development.

2. The Chairman of the Navajo Tribal Council shall prepare for the approval of the Advisory Committee, the Economic Development and Planning Committee, and the Resources Committee of the Navajo Tribal Council:

a) A report describing how the Navajo Nation Energy Policy is being implemented, including a discussion and introduction of appropriate and proposed codes, amendments, regulations, and a report on resource inventory.

b) A report outlining the progress of immediate action being taken by the Navajo Nation to institute interim measures acquiring more equitable shares from existing contracts, leases, and agreements.

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3. These reports shall be submitted no later than ninety (90) days after the certification of this resolution.

4. A moratorium is declared on all new energy development, including leases, permits and right-of-ways, except those presently under negotiation. This moratorium shall be in effect until the appropriate aforementioned reports are reviewed and approved by the appropriate committees of the Navajo Tribal Council.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 59 in favor and 0 opposed, this 29th day of April, 1980.

Chairman
Navajo Tribal Council

Senator MELCHER. Dallas Brien, director, natural resource program, Turtle Mountain Tribe.

STATEMENT OF DALLAS BRIEN, DIRECTOR, NATURAL RESOURCE PROGRAM, TURTLE MOUNTAIN TRIBE, BELCOURT, N. DAK., ACCOMPANIED BY RANDY FUNK, AGRICULTURAL ECONOMIST; AND MOHAMMED VIRK, PETROLEUM ENGINEER

Mr. BRIEN. Mr. Chairman and members of the Subcommittee on Indian Affairs, I should like to introduce my colleagues, and also with us are members of the Turtle Mountain tribal government, Belcourt, N. Dak. They are in the rear there, and I wish they would just step forward. That is Mr. Julias Grant, a councilman, and also a member of the oil and gas committee of the Turtle Mountain Tribe. With him is Mr. Ron Paltier, and he is the chairman of the oil and gas committee and also a member of the council.

My name is Dallas Brien. I am the director of the human and natural resource development program of the Turtle Mountain Tribe, and with me are several staff members. To my right is Mr. Randy Funk, our agricultural economist, and to my left is Mohammed Virk, V-I-R-K. He is our petroleum engineer.

We, the Turtle Mountain delegation, are extremely pleased to have this opportunity to appear before this committee and to express our position with respect to Senate bill 1894. We believe that Senate bill 1894 nicely accommodates the present disposition of the Turtle Mountain Tribe. That disposition is precisely in keeping with the design and, we believe, the intent of Senate bill 1894.

The Turtle Mountain Chippewa Tribe has established the human and natural resource development program as of October of 1981. The goal of the program is to maximize the development of natural resources of the Turtle Mountain Tribe. One of our objectives of the Turtle Mountain Tribe is to establish a comprehensive land management program for the surface and subsurface development of tribal and Indian lands. Since our tribe has limited financial resources, the human and natural resource program was funded through a grant from the administration for Native American programs. Those funds are being used to establish a beginning capability of managing and developing our own natural resources. As a result, we have hired a petroleum engineer, geologist, agricultural economist, and we are also in the process of seeing the employment of a land planner, environmental protection specialist, and a managerial accountant which would provide the capability of managing, monitoring, and developing of the Turtle Mountain tribal lands.

We have approximately 45,000 acres of land, individual and allotted, under present oil and gas leases. We have no production. We, the tribe and BIA realty office, have been approached within the last several weeks by an oil and gas company who wishes to drill for oil and gas on the Turtle Mountain Indian Reservation.

Mr. Chairman, you have opened this hearing by identifying the multiple obstacles that presently inhibit the tribes from effectively carrying out the management and development of their respective re-

sources. We, too, are becoming fully aware of these obstacles. In this respect, I would like to introduce Mr. Funk, who will make some current observations with respect to the problems that we have in carrying out the proposed negotiations.

Mr. FUNK. Senator, one of the main concerns, as I see it, for our tribe and our specific case is the disparity between the competitive production incentives between fee simple land and tribal and allotted land. In our particular area, the majority of fee simple lands are at 12½ percent royalty, and we are required to have 16⅔ percent royalty on all leases. This creates a production disincentive of approximately $1.18 per barrel for each barrel of oil produced within the area.

I do believe this bill is moving us in the right direction in terms of clarifying the legal status, the role, and the powers of the tribe which have not fully been developed. Another aspect, which I think is important to our particular area, is with the Supreme Court ruling of late. The question of taxation, in our area, concerns not only the tribe but also the State, because in North Dakota we are generally working with an 11½-percent production tax which is indirectly placed on oil which would be produced on tribal property, and I really believe that it is of extreme importance if the tribes are to have the right to tax, they have to have the ability to be accommodated within the State. In our particular case, if we were to tax, we would only create a greater disincentive to produce our own property.

My last few words will be about the review of the Secretary. From what I have seen in the short period of time that I have been working for the Turtle Mountain Reservation, I have not seen any proof whatsoever that the BIA, based on just economic considerations, has been acting in the best interest of the tribe and of the allottees, and that is something that should be clarified. Much more effort should be put into this area. The review that there is now and the review that is in this bill, I think, should be upgraded.

Mr. BRIEN. Mr. Chairman, to my left is Mr. Mohammed Virk. He is our petroleum engineer, and he has had an opportunity to review the Linowes Commission recommendations, and I believe in that respect he should like to make some observations.

Mr. VIRK. Senator, I thank you for the opportunity you have given to the tribe and to us to testify before the committee. We support the bill 1894 and favor provisions 1 and 2 and are not in favor of provision 3. We have some reservations regarding provisions 1 and 2.

We think that the recommendations of the Linowes Commission should be included in provision 1 of the bill regarding specifying that USGS has failed to manage Indian lands. It should be relieved of its duties to manage Indian lands and a new organization, government or whatever, should be given authority to deal with the whole thing, because if it is left vague, like the Secretary of Interior is entitled to do the whole thing and it delegates that power to BIA or to USGS, then they might rename USGS conservation division as mineral management office and just whitewash the whole operation. It might create difficulties for the whole management function.

In addition to that, as the U.S. Government is not meeting its commitments of management of the Indian lands, if it is not taken care of, the Indians should be allowed to manage their own lands. But as

the constitutional concern and constraints are there and you are trying your best to help the Indian people in managing their own affairs, we strongly support the bill, S. 1894, and realize that in section 2 of the bill the provision that 30 days be given to the tribes for a Presidential review are not enough. There should be at least 90 days. The tribes will not even be able to prepare for a Presidential presentation or review.

And, I also feel that provision of an Indian corporation should also be included in section 1 of the bill because it will help them. Section 3, I think, might create some controversies and some obstacles, and it might be unnecessary.

My last recommendation is that as many specifics of the Linowes Commission as can be included in the bill should be done. Otherwise, everything will be vague, and the bureaucracy will keep it as it is. There will be legislation, there will be regulation, but if there is not a will to do it, nothing happens. It will remain the same thing.

Thank you for this opportunity.

Mr. BRIEN. In conclusion, then, Mr. Chairman, our petroleum engineer made some observations with respect to this bill and which we feel are important. However, officially, we, this delegation of the Turthe Mountain Tribe, have been authorized to act in behalf of the Turtle Mountain Tribe who, in a formal session dated February 9, 1982, declared their official support in favor of Senate bill 1894. We have no difficulty with the present language of the bill which, in effect, provides the Turtle Mountain Tribe, if they so wish, to enter into certain agreements with the Secretary of the Interior for the disposition of tribal mineral resources. We believe the administrative policy and procedures which may develop as a result of this bill may be of critical concern to the tribe, and, in that respect, obviously, we hopefully will be given an opportunity to participate in the formulation and development of administrative policies and procedures by the Secretary of Interior.

With respect to the bill, we are very comfortable by virtue of our having consulted with the Council of Energy Resource Tribes, which is a highly capable and responsible organization that spoke most favorably of this bill.

In concluding our testimony, we wish to officially express, on behalf of the Turtle Mountain Tribe, that we officially support bill 1894. We, the delegation of Turtle Mountain, once again wish to express our appreciation to you, Mr. Chairman, and the members of this Select Committee on Indian Affairs, for being given this opportunity this morning to express our views on the present bill.

We thank you.

Senator MELCHER. I have one question and one comment.

First of all, the question. Are your leases restricted to a minimum of 16⅔ percent?

Mr. FUNK. To the best of my knowledge, they have been approved through the Department of the Secretary, and they simply have not taken into account the competitive production incentives within the area.

Senator MELCHER. Was the 16⅔ percent a decision of the tribe, then?

Mr. FUNK. To the best of my knowledge, what has been done in every lease that I have seen in terms of tribal property has been a flat

rate of 16⅔ percent and I believe also many of the allottees have been using the same rate.

Senator MELCHER. Well who decided the 16⅔ percent?

Mr. VIRK. It is BIA, the Bureau of Indian Affairs.

Senator MELCHER. We know of no legal requirement for the 16⅔ percent.

Mr. VIRK. Well, even in the Linowes Commission, they are recommending 16⅔, and BIA is following that. It puts the tribe at a disadvantage, the tribal land as compared to the fee simple land.

Mr. FUNK. I can see no proof that ther was even an issue brought up in this case of whether or not you would be creating a competitive disincentive, especially in our area which is essentially a checkerboard of allotted tribal and fee simple lands.

Senator MELCHER. Well, Federal leases can be let at 12½ percent; to our knowledge, Indian leases can be let at 12½ percent.

Mr. VIRK. Well, I think the tribes are given opportunity for several kinds of agreements, so they should be free to negotiate a variety of rates, also.

Senator MELCHER. Yes, I certainly agree.

I had one comment on the Linowes Commission recommendation. The jurisdiction issue affects both Federal and Indian oil and gas production. There certainly need to be legislative corrections; some of the recommendations that we have made earlier, in the time that the Linowes Commission was being formed and then making their findings. We, of course, do review all the recommendations, but we feel that this committee has a pretty profound grasp of corrections that should be made, in the operations of the U.S. Geological Survey, particularly as they affect production for the tribe or for Indian allottees. As a member of the Senate Energy Committee, which has jurisdiction over Federal lands and, of course, Federal oil and gas production, I believe that it is a sound position to recommend legislation that would affect Federal lands now.

For the past several months, I have been preparing legislation to implement corrections in the method of operations of the Geological Survey. The bill will put greater emphasis on forming an agency that is responsible for both Federal and Indian production in terms of inspections and accounting for royalties. There will also be proper outside auditing, not like now, where it is done by the Department of the Interior. That is like auditing your own books.

My bill requires that the General Accounting Office audit the royalty payments for both Indian oil and gas and Federal oil and gas production.

We have been at it a lot longer than the Linowes Commission. They were in operation for 6 months. We will review the findings in both committees, and my bill involves both Federal and Indian oil and gas production, so it will also probably be reviewed by both committees.

Mr. BRIEN. Mr. Chairman, in that respect, of course, we were not aware of your particular or the committee's recommendations. We had an opportunity to briefly review the Linowes recommendations, and that is not to say that that should supersede any other recommendation that may exist with respect to oil and gas management and development on Federal Indian lands. And so, therefore, if we were to imply that we are supporting the Linowes recommendations, that

is not correct, other than making some observations that seem to be in keeping with the needs of the general situation, and that is what we would like to point out.

Senator MELCHER. Well, Secretary Watt says he buys all of the—I guess the correct word he used "accepted". He accepted all of the 60-odd recommendations of the Linowes Commission except he wants to study the question of having the minimum of 12½ percent royalty on leases. The commission reccommended 16⅔, as you know. Secretary Watt says that he accepts, whatever that means, all of some 60-odd recommendations.

I am absolutely puzzled, having scanned the report and the 60-odd recommendations, how the Secretary could accept—if "accept" means "wants them implemented,"—what he intends to do. We could wait several years to see what would happen on that because there are a great variety of recommendations, some have substance, some seem to come off the top of their head, and some are clearly out in left or right field. Nevertheless, we want to allow the Secretary to explain what he finds good, bad, or indifferent, and what, exactly, he means by "accepts" at a March 5 hearing the committee has scheduled to question both the members of the commission and the Secretary of the Interior.

This is a matter of longstanding, and I take it very seriously. I was involved when I was in the House of Representatives in trying to find out what was wrong with the royalty payments on some Federal gas leases, offshore in the gulf. At that time—this was in the mid-1970's—the Geological Survey presented a plan to clean up the royalty accounting procedures they had on gas production offshore. I think that should have been a definite signal to those of us in Congress with oversight responsibilities to have then proceeded directly to onshore production, and we would have been 7 or 8 years ahead of where we are today. However, we did not.

We felt that since the Geological Survey was able to clean up the procedures on royalty accounting on the gas production in the Gulf, that they could also do it onshore. We have learned, to our sorrow, that is not the case at all. The principal problem still remains a very antiquated system of royalty accounting. No one knows, in the Geological Survey, or anywhere else in government, when production is going to be accounted for, when the royalties are going to be paid or even if they will ever be paid. That is a terrible situation, and we should not allow it to exist much longer.

I cannot say that the bill I will introduce will be the one that Congress or the committees will find to be the proper vehicle, but I will be ready to present it in the next several weeks. In the meantime, we will hear from Secretary Watt and the commission members on March 5.

Mr. BRIEN. Incidentally, Senator, in view of your present explanation, I personally would share your point of view with respect to this matter of recommendation; that I am not aware of this other report, so, therefore, in view of your explanation, I share your points of view by virture of the experience of the committee, obviously, in dealing with this matter for several years. I would think that definitely it deserves some prominent consideration of these matters.

Senator MELCHER. Well, I do not want to mislead you. Our interest was aroused by what was happening on the Wind River Reservation with the Shoshone and Arapahoe and the news reports that were gen-

erated by those happenings. We only got into it seriously beginning in December of 1980 in that building across the street, the Federal Building, when we tried to ascertain if this was unique to one reservation. To our sorrow, it was not unique to one reservation or was not unique to just reservations, either. We found an outdated, outmoded, broken down system of inspection and royalty accounting that very seriously, must be corrected quickly.

Mr. BRIEN. Mr. Chairman, is it possible, then, that we may be given an opportunity to review those recommendations? We would be more than happy to forward a statement with respect to the committee's recommendations.

Senator MELCHER. At the time of the introduction of the bill, I will make sure that we have an accompanying statement to fully explain why we believe the corrections must be made and what the bill would do to make those corrections. We will certainly make sure that you get a copy of it and will make it available to all interested parties.

Mr. BRIEN. Thank you, Mr. Chairman.

Senator MELCHER. Thank you.

Robert Chasing Hawk, chairman, Cheyenne River Sioux Tribe?

Is Robert Chasing Hawk here?

[No response.]

Senator MELCHER. Austin Gillette, chairman, Fort Berthold Tribal Business Council?

Austin Gillette? Is Mr. Gillette here?

Franklin Perez, Fort Belknap Community Council? Franklin, please proceed.

STATEMENT OF FRANKLIN PEREZ, FORT BELKNAP COMMUNITY COUNCIL, HARLEM, MONT.

Mr. PEREZ. Good morning, My name is Franklin Perez. I am the tribal representative of the Fort Belknap Indian Community, of the tribal government. Here today, I am representing the tribal government as a representative of the tribal council.

I have provided a statement for you. It is similar in some aspects, but I will read the heading, then I will briefly go through the points.

The tribal government of the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community would like to thank the Senate Select Committee on Indian Affairs and yourself, Senator Melcher, for conducting this hearing on S. 1894, which is a bill to permit Indian tribes to enter into certain agreements for the disposition of tribal mineral resources and for other purposes.

The Fort Belknap Indian Community Tribal Government is generally supportive of S. 1894 because it allows an Indian tribe and individual Indians more flexibility in pursuing the development of their natural resources. However, it is extremely important to emphasize that Indian tribes and individual Indians who possess mineral interests require technical assistance in the development of those resources.

The United States of America, as trustee, has the duty and responsibility to provide Indian tribes with the necessary technical expertise and protection as the trustee to Indian tribes and individual Indians in order that they may develop their natural resources in a manner

which will serve the best interests of Indian tribes and individual Indians.

The tribal government of the Fort Belknap Indian Community would like to recommend that S. 1894 be amended as follows.

The first one, we discussed it earlier, about the 60-day limit, reducing it to 1 year. I will pass that.

No. 2, subsection 1(a) should be amended to provide that the Secretary shall be responsible to provide Indian tribes and individual Indians with financial resources to employ technical experts to Indian tribes and individual Indians in order that they may more economically develop their mineral resources.

The United States of America, as trustee, exercises an enormous amount of approval authority over the development of natural resources of Indian tribes and individual Indians. However, it goes without saying that oftentimes the Department of the Interior and its agency, the Bureau of Indian Affairs, which carries out the trust responsibility of the United States, is ill-equipped to provide the necessary technical assistance to Indian tribes in order that they may develop their natural resources. If Indian tribes and individual Indians do not have the help of technical experts in pursuing the development of their natural resources, they are placed in an extremely disadvantageous position in dealing with large exploration, oil and gas, and mining companies who have an enormous amount of experience and technical expertise.

No. 3, S. 1894 needs to be amended to provide a substantive right to Indian tribes and individual Indians who are placed in a compromising position or their resource taken without just compensation as consequence of the Secretary's exercise, or lack thereof, of trust responsibility. This recognizes the United States' longstanding trust responsibility to tribes and individual Indians generally and in the management and use of Indian property. If the United States breaches its trust to a tribe or individual Indian pursuant to this act, the tribe or individual Indian should have a substantive right against the United States for compensation due to the breach of trust.

The Fort Belknap Indian Community would propose the following language:

"Recognizing the United States longstanding trust responsibility to Indian tribes and individual Indians generally and in the management and use of Indian property, an Indian tribe or individual Indian shall have a substantive right against the United States for compensation due to breach of trust."

The problem of an Indian tribe or individual Indian in sustaining an action against the United States for breach of trust due to the lack of a substantive right is quite evident in *U.S.* v. *Mitchell*, 1980. In *U.S.* v. *Mitchell*, the Quinault Tribe and individual Indians could not sustain a cause of action against the United States for a breach of trust due to the mismanagement of the timber resources due to a lack of a substantive right within the General Allotment Act.

Land and natural resources to Indian tribes hold an enormous amount of culture and traditional importance, and many Indian tribes are reluctant to develop their natural resources unless adequate precautions are taken and the development is in the best interests of tribal

members. Further, Indian natural resources are the last resources to be developed, and, as a consequence, Indian tribes do not want their resources exploited to the detriment of their culture and degradation of the lands.

Therefore, it is important that the trustee bear this in mind in exercising its approval authority over any agreement entered into by an Indian tribe pursuant to this bill, with the understanding that should the trustee fail to exercise its trust responsibility or to do so in a manner not in keeping with the high fiduciary standards that the Government has traditionally been held to concerning Indian tribes and individual Indian property, a substantive right for compensation shall lie.

No. 4, section 1(d) provides for Presidential review of the tribal proposal if disapproved by the Secretary. However, it is difficult to comment with regard to the review process since it is unclear from that subsection of S. 1894 exactly how the mechanism for review would operate. It is our feeling that the Presidential review should be clarified as to whether or not an agency of the executive branch of Government would have the Presidential review or whether or not the agreement would be reviewed internally from the White House.

The Fort Belknap Indian Community Tribal Government would like to thank the Senate Select Committee on Indian Affairs for conducting these hearings, and hopefully it will assist in expediting the passage of this bill which would be beneficial to Indian tribes and individual Indians in the development of their natural resources. If further information is required by the committee, the tribal government of the Fort Belknap Indian Community shall submit it immediately upon request.

Respectfully submitted, tribal government of the Fort Belknap Indian Community of the Fort Belknap Indian Reservation, Mont.

Senator MELCHER. I do not know what we do in this bill about the trust responsibility by allowing litigation by the tribe or an individual Indian on whether or not the trust responsibility has been properly performed. That is a very difficult problem to ascertain. The bounds and the requirements for establishing that responsibility are complex. What we are hopeful for in the bill is that the tribes themselves get the expertise and the guidance for making arrangements that are good, prudent business. The Secretary himself should exercise his trust responsibility by finding any obvious unfair flaws in the agreement, whether they be unfair to the tribes or to individual Indians. I doubt whether this is a proper bill to define the bounds of overall responsibility that the Secretary has.

Thank you, very much.

Your prepared statement will be made a part of the record at this point.

[The statement follows:]

PREPARED STATEMENT OF THE GROS VENTRE AND ASSINIBOINE TRIBES OF THE FORT BELKNAP INDIAN COMMUNITY TRIBAL GOVERNMENT OF THE FORT BELKNAP INDIAN RESERVATION, MONT., SUBMITTED BY FRANKLIN PEREZ

The Tribal Government of the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community would like to thank the Senate Select Committee on Indian Affairs and yourself, Senator Melcher, for conducting this hearing on S. 1894, which is a bill to permit Indian tribes to enter into certain agreements for the disposition of tribal mineral resources, and for other purposes.

The Fort Belknap Indian Community Tribal Government is generally supportive of S. 1894 because it allows an Indian tribe and individual Indians more flexibility in pursuing the development of their natural resources. However, it is extremely important to emphasize that Indian tribes and individual Indians who possess mineral interests require technical assistance in the development of those resources.

The United States of America, as trustee, has the duty and responsibility to provide Indian tribes with the necessary technical expertise and protection as the trustee to Indian tribes and individual Indians in order that they may develop their natural resources in a manner which will serve the best interests of Indian tribes and individual Indians.

The Tribal Government of the Fort Belknap Indian Community would like to recommend that S. 1894 be amended as follows:

1. § 1 (a) should be amended to provide that the "Secretary shall approve any such agreement within sixty (60) days of the submission to him unless the Secretary finds that such agreement is not in the best interest of the Tribe."

The Tribes feel that the time limit for the Secretary to approve or disapprove any such agreement entered into pursuant to S. 1894 should be limited to a sixty (60) day period rather than one (1) year which seems to be an enormous amount of time to give the Secretary to move on an agreement. Ordinarily, these matters can be handled within a short period of time and often times a prolonged period of waiting could jeopardize the Tribes' interest in entering into a very beneficial and economically feasible development program.

2. § 1 (a) should be amended to provide that the Secretary shall be responsible to provide Indian tribes and individual Indians with financial resources to employ technical experts to Indian tribes and individual Indians in order that they may more economically develop their mineral resources.

The United States of America, as trustee, exercises enormous amount of approval authority over the development of natural resources of Indian tribes and individual Indians. However, it goes without saying, that often times the Department of the Interior, and its agency, Bureau of Indian Affairs, which carries out the trust responsibility of the United States is ill-equipped to provide the necessary technical assistance to Indian tribes in order that they may develop their natural resources. If Indian tribes and individual Indians do not have the help of technical experts in pursuing the development of their natural resources, they are placed in an extremely disadvantageous position in dealing with large exploration, oil and gas, and mining companies who have an enormous amount of experience and technical expertise.

3. S. 1894 needs to be amended to provide a substantive right to Indian tribes and individual Indians who are placed in a compromising position or their resource taken without just compensation as consequence of the Secretary's exercise or lack thereof of trust responsibility. This recognizes the United States' long-standing trust responsibility to Tribes and individual Indians generally and in the management and use of Indian property. If the United States breaches its trust to a Tribe or individual Indians pursuant to this Act, the Tribe or individual Indian should have a substantive right against the United States for compensation due to the breach of trust.

The Fort Belknap Indian Community would propose the following language: "Recognizing the United States' long-standing trust responsibility to Indian tribes and individual Indians generally and in the management and use of Indian property, an Indian tribe or individual Indian shall have a substantive right against the United States for compensation due to the breach of trust."

The problem of an Indian tribe or individual Indian in sustaining an action against the United States for breach of trust due to the lack of a substantive right is quite evident in *U.S.* v. *Mitchell*, 455 US 535, 63 L. Ed. 2d 607, 100 S. Ct. 1349 (1980). In *U.S.* v. *Mitchell, supra*, the Quinault Tribe and individual Indians could not sustain a cause of action against the U.S. for breach of trust due to the mismanagement of the timber resources due to a lack of a substantive right within the General Allotment Act.

Land and natural resources to Indian tribes hold an enormous amount of culture and traditional importance and many Indian Tribes are reluctant to develop their natural resources unless adequate precautions are taken and the development is in the best interests of tribal members. Further, Indian natural resources are the last resources to be developed and as a consequence, Indian tribes do not want their resources exploited to the detriment of their culture and degradation of the lands.

Therefore, it is important that the trustee bear this in mind in exercising its approval authority over any agreement entered into by an Indian tribe pursuant to this bill, with the understanding that should the trustee fail to exercise its trust responsibility or to do so in a manner not in keeping with the high fiduciary standards that the government has traditionally been held to concerning Indian tribes and individual Indian property, a substantive right for compensation shall lie.

4. § 1 (d) provides for Presidential review if the tribal proposal is disapproved by the Secretary. However, it is difficult to comment with regard to the review process since it is unclear from that sub-section of S. 1894 exactly how the mechanism for review would operate. It is our feeling that the Presidential review should be clarified as to whether or not an agency of the executive branch of government would have the Presidential review or whether or not the agreement would be reviewed internally from the White House.

The Fort Belknap Indian Community Tribal Government would like to thank the Senate Select Committee on Indian Affairs for conducting these hearings and hopefully it will assist in expediting the passage of this bill which would be beneficial to Indian tribes and individual Indians in the development of their natural resources. If further information is required by the Committee, the Tribal Government of the Fort Belknap Indian Community shall submit it immediately upon request.

Senator MELCHER. Next is Norman Hollow, chairman of the Fort Peck Tribal Executive Board? Please proceed, Norman.

STATEMENT OF NORMAN HOLLOW, CHAIRMAN, FORT PECK TRIBAL EXECUTIVE BOARD, POPLAR, MONT.

Mr. HOLLOW. Hello.

Senator, Mr. Chairman, as chairman of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, I appreciate this opportunity on behalf of the tribes to present my view of S. 1894.

I know that you appreciate that oil and gas and other mineral rights are the single most valuable natural resource on the reservations. These are resources that cannot be replaced. For that reason, I am sure that the committee will wish to be sure that any bill it reports will not open the way for tribes or individual Indians to be overreached or to receive less for their trust oil and gas and minerals than would result from a deal between two companies both informed and experienced in oil and gas mineral matters. That should be the objective of the bill.

I should like to direct my comments to oil and gas because at present they are the only commercially valuable minerals on my reservation. At Fort Peck the great majority of all trust oil and gas is owned by individual Indians. The tribe's interests are comparatively small. This is because in 1954 Congress transferred tribal oil and gas to the individual Indian surface owners. These individual Indians are the tribe's chief concern. As a whole, they are not highly educated. They have no practical business experience. They have not dealt with large sums, and they have had no occasion to make business deals of any consequence. They are without information as to the value of their trust oil and gas, and they have no experience in oil and gas matters. They are not aware of the many options that are open to a party that knows what he is doing when negotiating for an oil and gas lease or any other contract for the development of trust oil and gas.

These Indian people are on the lower end of the economic scale. They tend to look on any sum of money offered for their oil and gas as a

piece of good luck. When a major oil company offers a substantial sum of money as a bonus for a lease or contract, the money looks good to the individual Indian. But the fact may be that with proper representation an Indian might get a bonus ten times higher or might get a higher royalty and other concessions that would mean speedier development. In this connection, I am bothered by the way some companies get these leases and contracts.

Speaking for my own reservation, the companies, with Interior's encouragement and blessing, hire an educated tribal member known to the Indians, and even popular with them, to solicit leases. Such an Indian has little difficulty in persuading aged and uninformed Indians to sign leases for sums that look very large to people in their income class. This is what is now going on on our reservation. S. 1894 would extend the opportunity for companies to work the same practice to get development contracts.

The fundamental thing wrong with S. 1894 is that it provides the tribes and individual Indians with no protection or advice during the most important time; that is, when the company or its agent is soliciting a lease or contract from the individual Indian. Perhaps most tribes will have the means and will to hire independent consultants. But S. 1894 leaves the uneducated and uninformed Indian on his own.

I know S. 1894 calls for the Secretary's approval. The bill even permits a tribe to ask for review by the President if the Secretary disapproves. That provision is just for show. It is made for the oil company, not the tribe. If the Secretary disapproves, the company is the one that will want to flex its political muscle in the White House.

Getting back to the Secretary's approval, judging from my own years of experience, I do not think it means much. The Secretary's approval amounts to approval at the agency or area office level. Oil and gas leases and contracts are business matters. The economics of the deal are what is important. The Interior Department supplies nobody to help a tribe or an individual Indian on the economics or negotiations of a good business deal. Calling for the Secretary's approval after an Indian is induced to sign a lease or contract is not protection. No agency or area office, not even the central office in Washington, has a qualified petroleum engineer or petroleum economist or mining engineer. This is true even though the most valuable asset managed by the Bureau of Indian Affairs is trust oil and gas. The Bureau in the past has asked for such expert help, but the Secretary has never seen fit to supply it. Yet the Bureau has plenty of help for far less valuable resources. The Bureau has employees with graduate degrees as graziers for the trust grasslands, with degrees as foresters for the trust timber, with degrees in agriculture for the trust farmland, and with degrees in water control and management for the trust water resources. But the Bureau has nobody for oil and gas and other minerals.

The U.S. Geological Survey is of no help. The USGS has no interest in the economics of oil and gas, especially not for Indian oil and gas. From the media reports I have heard and read the USGS cannot even collect the royalties on oil and gas or keep royalty oil and gas from being stolen. USGS just trusts the oil companies to be honest.

Mr. Chairman, S. 1894 opens the way for every tribe and every individual Indian to enter into one-sided and mismatched negotia-

tions with highly informed, sophisticated, skilled, experienced, and clever representatives of the oil and gas industry, as well as the other mineral industries for leases of trust oil and gas and other trust minerals. S. 1894 would permit such uneven and unequal negotiations to result in complicated agreements filled with technical terms and slippery provisions well beyond the understanding of the ordinary, intelligent, and well-educated person who has no special experience in oil and gas or other minerals. Indians are no match for oil companies.

S. 1894 provides no safeguards except the approval of the Secretary, approval that has never proved of value in the past. Present indications are that the Secretary's approval amounts to little more than rubber-stamping what industry wants.

Mr. Chairman, if S. 1894 is to become law, safeguards must be written into the bill. I shall not detail such safeguards. The tribes have instructed their general counsel in Washington, D.C., to appear at the Washington hearings and to present to the committee suggested changes to accomplish that goal.

No, 1, most important is the need for the bill to provide for independent, informed advice for tribes and Indians during the course of solicitation and negotiation of leases and contracts.

No. 2, the bill should place a limit on the term of the lease by fixing a term of years instead of so long as oil or gas is produced in paying quantities.

No. 3, the bill should provide that after a specified period of years, say 5 years, oil and gas leases should be limited to horizons then producing unless further development work is done within a prescribed period of 1 or 2 years.

No. 4, the bill should provide for a complete overhaul of the BIA lease form. That form was originally written by the industry, and the key provisions are for industry's benefit.

These and other proposed changes will be submitted to the committee in detail by the general counsel located in Washington.

Mr. Chairman, thank you very much for permitting me to appear and express my view.

Senator MELCHER. Thank you, Norman. First of all, section 2 refers to individual Indians owning trust or restricted minerals within the boundaries of a reservation which are subject to an agreement entered into pursuant to section 1 of this act. This means that under this particular section, section 2(a), the only individual Indians that could enter into such an agreement are those that are on a reservation where the tribe has entered such an agreement. Section 2(b) does allow more flexibility for the individual Indians and is the only section of the bill that would provide the opportunity for individual Indians owning trust or restricted minerals to make their own deals. Nevertheless, your comments on that are well noted by me and by the staff here.

I think that your recommendations for safeguards are already permitted in the bill. The bill would permit, first of all, your second recommendation, placing a limit on the term of the leases by fixing the term of years instead of so long as oil and gas are producing in paying quantities. That is one of the things that we have noted should be corrected in the 1938 act to allow that to be done if tribes or the individual allottees want to make such arrangement.

As to the third point that you make in those series of safeguards, the bill does provide the opportunity to have an agreement for a specified period of years—you say you recommend perhaps 5 years—and past leases should be limited to horizons then producing. That is one of the flexibilities that we think, as a practical matter, should be available to Indians.

As to the fourth one, I think the bill seeks to do that, too. While it leaves the present 1938 act alone, having a different lease form with different terms is certainly provided for in the bill, and it is our intent that it be provided for in the bill. One of the things that we think is wrong with the 1938 act is that it is too restrictive. It is for a set period of years—a 10-year lease—and as long thereafter as there are paying quantities of oil or gas. Those are things we find at fault here in the restrictions that are now in place, so the bill does allow those things. It does not set it out what it should be, but just allows the tribe itself or the individual Indian to make that determination.

Now your basic point on whether or not there is sound advice given to tribes or individual Indians on what should be in a lease is one that is not addressed in the bill. Being realistic about it, I agree with you that there probably is not adequate expertise within the Department of Interior and within the Bureau of Indian Affairs. I wish it were. I wish the expertise and experience were available, because I think it would be most helpful to everybody.

Thank you very much, Norman.

Mr. HOLLOW. Senator, my concern is that in the past, my many years of experience working with the tribes and the Bureau and the Secretary's Office, if a provision is not provided for specifically in the bill, and if there is a possibility of regulatory authority provided to the Secretary, they can misconstrue the provisions of a bill if it is not thoroughly explained. This is what I was trying to say.

Senator MELCHER. I share your concern.

Mr. HOLLOW. Yes.

Senator MELCHER. I think we ought to write the bill, pass the bill, and then write the regulations, too.

Mr. HOLLOW. Right.

Senator MELCHER. Thank you very much.

John Windy Boy, chairman, Chippewa Cree Business Committee.

STATEMENT OF JOHN WINDY BOY, CHAIRMAN, CHIPPEWA CREE TRIBE, ACCOMPANIED BY MARK SUAGEE, ATTORNEY AT LAW; AND REBECCA GLOVER, NATURAL RESOURCES DIRECTOR, BOX ELDER, MONT.

Mr. WINDY BOY. My name is John Windy Boy, chairman of the Chippewa Cree Tribe. I have with me here my attorney, Mark Suagee, and to my left is Rebecca Glover, natural resources director.

Gentlemen, the Chippewa Cree Tribe endorses this legislation proposed by Senator Melcher from our State of Montana. This piece of legislation has been needed for some time, and we earnestly support its passage.

The purpose of this legislation appears to be that of allowing the tribes to assess what arrangement for mineral resources development

best fits their resources and needs. This is, to us, the most logical purpose and one that fits the goal of self-determination. These resources developed from our lands have for too long been viewed restrictively, in a way that has not acknowledged the need to develop them in keeping them with the most lucrative methods of the industry and the abilities of the tribes to expand and develop their economic options.

While the bill is in substance a good bill, we would point out some suggestions for its improvement. First, under section 1(c), the 1-year period allowed for secretarial approval is too long. Those agreements are arrived at after careful deliberation of the tribes, their attorneys, and technical staff. To allow up to a full year for approval or disapproval is too much of a burden to the tribes. While we appreciate the phrasing of the sentence, in the words, "the Secretary shall approve," a shorter period of time would surely be sufficient for careful inspection, 90 days' time would be more mindful of the tribe's desire to enter into an agreement. A phrase should be added to the effect that should secretarial approval not be given within that period, that the agreement is approved.

Second, in that same paragraph is the requirement that the Secretary approve the agreement unless he finds it "not in the best interest of the tribe." We hope this determination would be made in a manner acknowledging the fact that the tribe has presumably done some work and assessment in deciding on the agreement forwarded for secretarial approval. To insure that, we suggest adding a sentence to state that "the best interest of the tribe" should consider the tribal choice made, and while weighing related factors of risk, profitability, and personnel resources, should assess the tribal decision in a manner of reasonable optimism and in the spirit of self-determination.

Lastly, the provision on Presidential review is questionable. Given the present atmosphere in the White House and the absence of an Indian relations man, the effect of the review is vague. In any event, there should be provision allowing specifically for review under the Administrative Procedure Act and mandamus procedure for tribal enforcement.

We are pleased to see this bill introduced and to have this opportunity to comment. We will await its passage and hope the regulations coming later will also acknowledge the need to allow and encourage the tribes to make the most of their mineral development when they choose to do so. If you have any questions, Mr. Suagee and Ms. Glover are here to answer questions.

Senator MELCHER. Well, we are still bunching up on that question of how long the Secretary has to approve an agreement, again making sure we allow for completion of the environmental impact statement. I do not know how to get around that, frankly. If the environmental impact statement could be completed earlier, and in some instances perhaps it could, I think it would have to be started before the Secretary actually had the application by the tribe or the individual Indians. If it could be done that way, if it could start ahead of time, perhaps we could shorten that timeframe. But I agree with you. It would be more expeditious and more practical if, after the proposal is presented and the Secretary reviews it within 90 days, we would not still have to look at the complexities of an environmental impact statement.

I want to thank you very much for your testimony. We appreciate it very much.

Next, we have Joe McKay.

STATEMENT OF JOE McKAY, MEMBER, BLACKFEET TRIBE OF MONTANA

Mr. McKAY. Senator, my name is Joe McKay. I represent myself individually as a member of the Blackfeet Tribe of Montana. I also represent the views of the newly formed Indian law clinic at the University of Montana School of Law.

I am an enrolled member of the Blackfeet Tribe of Montana, which is a tribe organized pursuant to sections 16 and 17 of the Indian Reorganization Act of 1934. I oppose Senator Melcher's bill, S. 1894, at least as it exists in its present form.

Before stating why I oppose this bill, I want to make clear that I agree with what appear to be the two purposes of S. 1894, which are the promotion of Indian self-determination for energy development by allowing tribes to be involved in managing the development of their own resources and tribal economic enhancement to long-range economic development to be accomplished by giving tribes the latitude they need to seek the best return they can for their mineral resources.

I am an advocate of tribal self-government, and that is exactly why I am here. I disagree with the means the Senator would employ to fulfill these purposes. In effect, the means employed here is to grant directly to the tribal councils or tribal governments the power to dispose of communally owned tribal mineral interests without considering that the councils or governments are subject to the limitations of their governing documents, at least those tribes organized pursuant to sections 16 and 17 of the Indian Reorganization Act of 1934. As a result, true tribal self-government, government of Indian people by Indian people, is eroded, and the people who are the tribe are not allowed to participate in determining a framework and setting safeguards and limitations for the disposition of this very important communally owned tribal interest.

It must always be remembered that the trust responsibility of Congress and the executive branch runs to the tribes as tribes, not to the councils as tribes. The effect of this bill is to change the structure of those tribes organized under the Indian Reorganization Act of 1934 by granting the governing body the power to dispose of tribally owned minerals. Such a change is not consistent with the history or purposes of the Indian Reorganization Act of 1934, which contemplated that once a tribe was organized under that act, changes in the form or structure of tribal government could only be carried out in the same manner that the original assumption of governmental power under the act was originally carried out. That would mean submitting any proposed change in tribal governments to a vote of the tribal membership.

Senator Melcher's bill plainly ignores this requirement of the 1934 Indian Reorganization Act. It is highly doubtful that Congress could alter the structure of tribal governments organized under the Indian Reorganization Act by unilateral congressional action. If they could, it would have to be accomplished by first amending or repealing the

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1934 act and then expressly stating that the tribal constitutions are to be so changed in a manner desired by Mr. Melcher's bill. This bill, S. 1894, does neither of those things, yet it would ultimately alter tribal constitutional power of the tribal governments. As such, this bill erodes self-government and circumvents the constitutional framework of many tribes. Ultimately the proposed bill eliminates the opportunity for individual membership participation in controlling governmental actions. Because S. 1894 does not consider the existence of tribal constitutional forms of government, it is likely that the power granted to it could not stand up to a challenge based on tribal law.

At this point, I would like to point out that I think Senator Melcher was in error in his statements to Mr. Small, that an appeal from tribal court could be taken to Federal district court. The Indian Reorganization Act and the case of *Santa Clara Pueblo* v. *Martinez* has held that the only recourse from tribal court, in a dispute between members of the tribe and the tribe involving tribal government, is through habeas corpus, and that is a criminal action. Therefore, there is no appeal on this issue from tribal court to Federal court.

Tribal council's powers are controlled by their constitutions. Most of these constitutions contain an article on the powers of the council. In that article, the powers of the council are divided into three groups; the enumerated powers, those powers specifically stated; the future powers, those powers a tribe never had that may be granted by Congress; and the reserve powers, which are, in effect. I read from a constitution from which I have deleted the name of the tribe:

> All powers heretofore vested in the tribe but not expressly referred to in this constitution shall not be abridged by this article but may be exercised by the people of the tribe through the adoption of appropriate bylaws and constitutional amendments.

That is a fairly boilerplate kind of provision, the effect of which is to say that any powers not expressly given to the council can only be granted to constitutional amendment. It would appear, then, that the power described by Senator Melcher's bill is not one of a council's enumerated powers; it is therefore a reserve power of the tribe which can only be exercised by the people of the tribe through constitutional amendment. So if one of the purposes of this bill is to eliminate potential litigation, all it does is give rise to further litigation in the tribal form.

Moreover, this bill ignores the status of existing law on Indian mineral leasing, which is that any tribe organized pursuant to sections 16 and 17 of the Indian Reorganization Act can preempt the requirements of the 1938 Mineral Leasing Act by adopting into their constitutions and charters a specific method for mineral development. While this does not address the problems expressed by the Crow Tribe and maybe some of the others not organized pursuant to the Indian Reorganization Act, I believe this approach could be used. They also must be governed by some tribal documents which could be changed.

It seems that although this is a valid method of achieving the same purposes enunciated by Senator Melcher, no tribe has, as of yet, taken advantage of this provision of the 1938 Indian Mineral Leasing Act. That provision reads in full that:

> The foregoing provisions—

And that is referring to the competitive bidding process and whatnot—

shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution or charter adopted by that tribe.

It has been clear from that language, and consistent with the past administrative interpretation, that an Indian tribe organized under the 1934 Reorganization Act could preempt the requirements of the 1938 Mineral Leasing Act by adopting into its constitution or charter a specific procedure for disposing of tribal mineral rights held by the tribe.

It would appear, then, that this method, although approved, has never been used. When looking to the timing of the 1938 Indian Mineral Leasing Act, which was only 4 years after the Indian Reorganization Act, the approach to tribal preemption of the specific leasing requirements is wholly consistent with that, with the policy and spirit of Indian self-government which existed at that time. Before a tribe could assume its new powers under the 1934 act, the tribal constitution had to be ratified by a majority of the tribal members. It was very appropriate then that the 1938 act should require constitutional change before a tribe could reassume the power to lease their beneficial title in minerals free of Federal control. Such a change would require a vote of tribal members just as the original reassumption of tribal power was carried out.

A final note on the 1938 Indian Mineral Leasing Act, and that is to taxes, something to which other people have expressed a concern here. If one of the stated purposes of Senator Melcher's bill is to enable Indian tribes to get the best return they can for their mineral resources, just as the 1938 act felt sure by not repealing that part of the 1924 Indian Leasing Act which allowed States to tax the production of minerals from Indian lands, Senator Melcher's bill also falls short. Such a provision is inconsistent with the congressional policy of tribal self-government in a statutory scheme implementing that policy.

Although the Supreme Court has recently held that Indian tribes have the right to tax mineral interests within Indian reservations, it does not preclude State taxation of the same minerals. Consequently, Indian tribes are deprived of a source of revenue which stems from a production of mineral resources. I think this is a problem also alluded to earlier, whereby double taxation immediately is a disincentive for the oil company to come in and produce on tribal lands. If the tribes had the sole right to tax these mineral interests by combining a tax structure with returns from the mineral development agreements, the tribes could truly maximize the return from their minerals and, at the same time, move toward self-sufficiency and end their dependence on Federal moneys.

I would ask that the Senator remember that just as the citizen of each particular county or State must live with what that government does, so does the individual tribal member who must live with the tribal government and its actions, and, as such, it is the individual tribal member through the tribal governing documents that should set the framework for the exercise of tribal governmental power over tribal property or its members, not the Federal Government.

The tribe is not like any other person who owns minerals. When the tribe owns minerals, it is owned by every person who is a member of that tribe. Tribal minerals are communally owned. Historically a tribe has never alienated land to the Federal Government without a vote of all the people, at least those people eligible or allowed to vote. Treaties were ratified by a majority of the members who could then vote. Agreements had to be approved by a majority of those members who were then eligible to vote. The 1934 act was accepted or rejected by a vote of the majority of the people of the tribe.

Without those thoughts in mind, I offer the following proposed bill as either amendments to or a complete substitution for the presently proposed bill of Senator Melcher. I believe these suggested changes give proper consideration to tribal self-government by fulfilling the two basic purposes sought to be achieved by the original bill; Indian self-determination for energy development and tribal economic enhancement through long-range tribal economic development.

Senator MELCHER. If it is the same bill that you attached to your letter to the committee, we have that bill, and it will be made part of the record.

Mr. MCKAY. May I read that for the people here to hear?

Senator MELCHER. How long is it?

Mr. MCKAY. It is no longer than your bill—three pages.

Senator MELCHER. OK. Proceed. Is it single-spaced or double-spaced?

Mr. MCKAY. A bill to permit Indian tribes to enter into certain agreements for the disposition of tribal mineral resources and——

Senator MELCHER. Can you summarize it? I think it might be better.

Mr. MCKAY. Basically, I changed your first provision where you grant blanket authority to the tribes by making them—requiring them to alter, incorporate into their constitutions these specific provisions, and by following that standard laid out in the Indian Reorganization Act, which is 30 percent of the eligible voters voting in such an election would be required, and that a majority ratifying would bind the tribe. I think that goes to the problem that has been listed here about providing safeguards. Once a tribe has adopted that into their constitution and charter, then they have set the limitations. Tribal self-determination has occurred. The companies then know what the tribes can or cannot do by looking to tribal law. The tribes know what they can, or the councils know what they can or cannot do by looking to tribal law, and the people know what the tribal councils can and cannot do and can hold them to that by making them follow tribal law.

Finally, I think the only other important part of my changes would be on section 3 where there are two alternatives offered. You offered a third; I offer a fourth. Agreements entered into by tribes for the development of production of oil and gas or other mineral resources from tribal lands, before the date of enactment of this act, must be ratified by the members of the tribe through the process required in section 1, which I have changed from the original section, for changing the tribes' original governing documents. Upon ratification by the required

number of tribal members, such agreements are then subject to approval of the Secretary as described in section 1.

Finally, on the taxing, I recommend that you include a new section 5.

The authority given to the States to tax production on oil and gas and other mineral resources on Indian lands by the act of May 29, 1924 is hereby repealed. Indian tribes will have the exclusive power to tax production from all minerals found within the exterior boundaries of the reservation, provided, however, that such a tax shall not become a lien or charge of any kind or character against the land or property of the Indian owners.

Thank you very much, Senator, for allowing me to present my views here.

Senator MELCHER. Yes, than you very much for your testimony.

First of all, the use of the provisions that would be permitted under this bill, if it were to become law, is really up to the tribe or the individual Indian allottee to the extent they are allowed to do so. The self-determination theory or policy—policy is a better word for it—is to assume that the tribes will run their own business, and so we leave that up to the tribe. The bill does not in any way set aside the 1934 Indian Reorganization Act.

Mr. MCKAY. I guess we would disagree there. I think that it does. It has a substantial impact on tribal power. At least as the bill reads, it appears that the tribal government could now go out—say in the case of the Cheyenne or even the Blackfeet, of which I am a member, and the Damson oil agreement—go out on its own and enter into an agreement without allowing the people of the community, of the tribe, to set the standards and limitations and safeguards that have been expressed as being concerns here on the actions of the tribal government. That is what the heart of my concern is. That is not clear.

Senator MELCHER. Yes. Now the 1934 act that you are speaking of, the Indian Reorganization Act, authorized the tribes to establish federally chartered business corporations, and to give the corporation authority to lease tribal lands up to 10 years. Now you have testified that the Blackfeet Tribe is organized under that act, and we do not touch that. What you are saying is that in order for that act to prevail and provide all the opportunities, that you want us to explicitly reaffirm that, and to the extent that the 1938 act has not changed anything in the 1934 act, we are not changing either one.

Mr. MCKAY. I guess I am not clear then, Senator. It seems to me that on the face of your bill, as I said, a tribal council could enter into one of these agreements and the Secretary would uphold it. Let me read to you from a provision of the Blackfeet constitution.

Senator MELCHER. Well, now we get to the next point. That is the third point I have. The bill does not set aside tribal constitutions. The bill leaves intact tribal constitutions, leaves intact tribal ordinances, leaves intact tribal codes, and leaves intact self-determination.

Mr. MCKAY. So even though the bill is passed, the council does not automatically have the power to enter into these agreements? They are still made subject to their own limitations contained in their governing documents; is that correct?

Senator MELCHER. That is true on the face of the bill.

Mr. MCKAY. All right.

Senator MELCHER. It does not modify any tribal law; it does not modify any tribal ordinance; it does not modify any tribal constitution; it does not modify any option under the 1938 Mineral Leasing Act; and it does not change the 1934 Reorganization Act except to extend it, to modify it by subsequent law. We do not touch it. There is just nothing in the bill that would do that.

Mr. MCKAY. I guess I believe, then, that some of the—at least members of my own particular council who I spoke to are under the impression that it does change it.

Senator MELCHER. Mr. McKay, what I get the impression you want to do is make sure that the Blackfeet tribal council lives up to the tribal ordinances, to the tribal constitution, and to whatever requirements exist under the Indian Reorganization Act, and whatever might be required under the 1938 Mineral Leasing Act. We leave that intact. Your remedy there, if you do not feel that they are living up to those requirements, would clearly be the tribal court.

Now let me clarify one thing in that regard. You are correct in saying that the appeal from the tribal court does not automatically come to the Federal district court, but certainly the option does exist for civil suit in Federal court by any member of the tribe against the company involved, under the contract, joint venture or whatever, and that is a remedy that can be sought for what Clayton Small was talking about and a remedy that you could seek, also, as a member of the Blackfeet Tribe.

Mr. MCKAY. My legal research of that position does not substantiate yours; that individual Indians have not been allowed to challenge—they have to challenge the action of the tribal council.

Senator MELCHER. It would help these two lawyers here if you could present the legal limits on an individual Indian suing a company where he has a legal standing in the substance of the matter. Surely, I think you are talking about a legal standing where you, as an individual, or anybody else, as an individual member of the tribe, could not sue the company involved.

Mr. MCKAY. Yes.

Senator MELCHER. In your particular case, you have Damson up there with an agreement, which I have never delved into, and I am stating here that it is my judgment that if you are dissatisfied with what that arrangement is, that you have a legal standing in a court against them.

Mr. MCKAY. For the Senator's information, I have sued the Blackfeet Tribal Business Council in tribal court on a previous agreement and was successful. I just completed the appellate process of that, and it was again upheld, and we do intend to sue the tribal council on violation of their tribal power on the Damson Oil Agreement in tribal court.

Senator MELCHER. Well, nothing in this bill will change that right.

Mr. MCKAY. All right. That is what I am concerned about.

Senator MELCHER. I think those are all the points I have, except that really we want to support the self-determination of the tribe to run its own business. We are not touching on that. We do not want to get involved. I personally will not get involved, and I do not believe the bill does get involved with a tribe and its ordinances or its constitution or how it runs its own business.

Mr. McKAY. All right.

Senator MELCHER. I hope that is reassuring to you.

Mr. McKAY. Yes, it is.

Senator MELCHER. Thank you, very much.

We passed over a couple of witnesses. I do not believe they are present, but I will read their names again. Robert Chasing Hawk and Austin Gillette?

Let me state again that the hearing record remains open until our next hearing in Washington on March 16 and that it will remain open until the end of March.

The hearing is adjourned.

[Whereupon, at 1:10 p.m. the hearing was adjourned.]

MARCH 16, 1982

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, D.C.

The committee met, pursuant to notice, at 10 am., in room 235, Russell Senate Office Building, Senator John Melcher (acting chairman) presiding.

Present: Senator Melcher.

Staff present: Timothy Woodcock, staff director; Pete Taylor, general counsel; Max Richtman, minority staff director; Virginia Boylan, staff attorney; John Mulkey, staff professional; Shirl Franklin, staff professional; Chris Drayton and Lynn Toledo, staff aides.

Senator MELCHER. The hearing will come to order.

The Select Committee on Indian Affairs of the Senate is meeting today to hear testimony on S. 1894. This is a bill designed to give Indian tribes greater flexibility than they now have under existing law in developing their mineral resources.

The Department of Interior in the past has approved several nonlease joint venture agreements, but the Department is now of the opinion that the statutory basis for doing so is rather uncertain. Therefore, at this time, although several agreements have been submitted, the Department is not approving any new agreements for mineral development except those entered into under the 1938 Indian Mineral Leasing Act.

That act restricts mineral development to leases developed through an advertising and competitive bidding scheme spelled out in Federal regulations.

Oil and gas development is clearly restricted, by statute, to competitive leasing and regulations governing development of other minerals also show clear preference for competitive bidding, although a tribe may request and be granted authority to negotiate such leases.

The tribes are still bound, however, to 10-year lease terms, and if minerals are found, they are bound by the proviso that the lease will continue as long as minerals are produced in paying quantities. The tribes are seeking more flexibility and want the right to negotiate other types of agreements and have every right to expect that the Secretary will approve such agreements in furtherance of the goal of Indian self-determination.

Of course, the Secretary must continue to exercise his trust responsibility and make sure that tribes are not exploited and that they receive fair return from their mineral estates.

S. 1894, which I introduced in November of last year will give the tribes the needed framework to enter into such agreements and will assure that the trust responsibility continues by giving the Secretary authority to approve such agreements and to promulgate regulations governing their terms and conditions.

We expect that the testimony the committee will hear today will provide suggestions for bettering the bill to insure that it meets the objectives I have just mentioned.

The committee welcomes these suggestions and will consider them very carefully. I should point out that S. 1894 does not affect the 1938 Indian Mineral Leasing Act and, therefore, tribes or allottees who are comfortable with that type of leasing process can continue to use the standard procedure.

I also want to point out that section 3 of the bill, as introduced, provides that agreements of the types described in the first section of the bill, which are joint venture or operating agreements, joint production agreements, or risk service agreements, managerial agreements, other than a lease under the 1938 act, that have been approved by the Secretary and are now under contract with the company would be ratified. In other words, this section 3 is a retroactive ratification of any outstanding such agreements, and that type of procedure is not one that is generally welcomed by Members of Congress. Traditionally Congress has a question on whether a provision provided in a law should be retroactive.

I would like the witnesses to keep that in mind and speak to that point. We have quite a long list of witnesses. I must tell each and every one of you that your time for testimony has to be limited; so, please be very concise and direct, and do not burden us with the reading of a statement that takes a long time. Please summarize your statement and permit the committee to ask questions if we feel it is necessary to further expand on a point or points that you are making in your testimony.

It will be necessary to conclude this hearing by 12 o'clock and that does not allow us too much time for any one individual.

All the written statements, or any additional statements that witnesses would like to have in the hearing record, will be made part of this hearing record. It is our intention to leave the hearing record open for at least 14 days so that additional written comments can be received from any of the witnesses, or anyone who is not present, but who would like to submit, in writing, a statement for this particular hearing record.

Our first witness this morning will be the Honorable Kenneth L. Smith, Assistant Secretary for Indian Affairs for the Department of Interior. He is accompanied by Roy H. Sampsel, Deputy Assistant Secretary for Indian Affairs, and Ken Stevens, Acting Director, Office of Trust Responsibilities of the Bureau of Indian Affairs. Tim Vollmann of the Solicitor's Office will also be available.

Please proceed.

STATEMENT OF HON. KENNETH L. SMITH, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY ROY H. SAMPSEL, DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS; JIM STEVENS, ACTING DIRECTOR, OFFICE OF TRUST RESPONSIBILITIES, BUREAU OF INDIAN AFFAIRS; AND TIM VOLLMANN OF THE SOLICITOR'S OFFICE

Mr. SMITH. Good morning, Mr. Chairman. It is good to be with you this morning to discuss our views on S. 1894, a bill which would

permit any tribe to enter into certain agreements for disposition of tribal mineral resources.

We recommend that this bill be enacted with the changes outlined in my statement submitted to the committee yesterday.

I would first like to introduced those accompanying me: Mr. Roy Sampsel, Mr. Jim Stevens, and Tim Vollmann from the Solicitor's Office. With the committee's permission, I would like to summarize my statement.

At the present time, the most frequently used authority for the development of Indian tribal mineral resources is the Mineral Leasing Act of 1938. That act permits the leasing of tribal land for mining purposes for a term not to exceed 10 years and as long thereafter as minerals are produced in paying quantities.

The act also requires that oil and gas leases be offered for sale by advertisement followed by a competitive bidding in most instances.

We had several problems with that particular act. The most serious of those is that it authorized development of tribal oil and gas resources only by leasing, ignoring the possibility of joint ventures, joint production agreements, risk service contracts and other nonlease ventures which are commonly used in mineral development today.

Since 1975, the Department has approved a number of nonlease ventures involving the developing of mineral resources pursuant to section 81 of title 25 U.S. Code.

However, we believe section 81 is inadequate to solve the problems that we have to address. Also, there is a question whether we have adequate authority to approve those nonlease ventures even by utilizing both acts.

We believe that enactment of S. 1894, with the amendments we propose, would provide a means for the United States to promote tribal self-determination in the development of Indian mineral resources. We recommend several amendments to the bill. No. 1, we recommend an amendment to clarify the legislative intention that the bill applies to all mineral resources rather than just energy resources.

No. 2, we recommend clarification of the language concerning the 1-year time limit for approval of agreements submitted to the Secretary. We understand that sometimes EIS's take more than a year. I think we could work with you to come up with some language that will address the intent of that particular phrase.

No. 3 we recommend deletion of the requirement of Presidential review of the Secretary's decision. We already have an administrative review process. We do not believe it is necessary to provide for an appeal to the President. As far as I know, Mr. Chairman, that requirement would be the first of its kind.

No. 4, we recommend the narrowing of the scope of the ratification provision in section 3. We would recommend that it go back only to 1975 because agreements approved prior to that may be in question.

No. 5, we recommend the addition of a provision holding the Federal Government harmless from liability in the event a tribe suffers damages alleged to have arisen as a consequence of approval by the Secretary of an agreement authorized by the bill.

That ends my summary, Mr. Chairman. We would be happy to answer any questions that you may have.

Senator MELCHER. How many agreements has the Department approved since 1975?

Mr. SMITH. Six agreements.

Senator MELCHER. Were they all on oil and gas, or other minerals?

Mr. SMITH. Mr. Jim Stevens may be able to answer that, Mr. Chairman.

Mr. STEVENS. Sir, we have one that was for uranium. The rest were oil and gas. Excuse me, one uranium and one for coal mining, and the others were oil and gas.

Senator MELCHER. What tribes were involved?

Mr. STEVENS. The Navajo, Jicarilla, Blackfeet, Crow, and Wind River.

Senator MELCHER. Which one was uranium?

Mr. STEVENS. Navajo.

Senator MELCHER. Which one was coal?

Mr. STEVENS. Crow.

Senator MELCHER. So, the other four are on oil and gas?

Mr. STEVENS. Yes, sir.

Senator MELCHER. Well, you approved those nonlease ventures pursuant to section 81 of title 25. What is the need for retroactivity then?

Mr. STEVENS. Sir, we just want to be sure that the agreements—I'm going to let my lawyer talk here.

Senator MELCHER. Mr. Vollmann.

Mr. VOLLMANN. The approvals of the half dozen or so agreements between 1975 and 1981——

Senator MELCHER. No, let's stop right there.

Is it six or more? You said, "half dozen or so;" is it six or more than six?

Mr. VOLLMANN. We have identified six. Those approvals were based on a variety of theories. The approval authority was based on section 81, which pertains to personal service contracts with Indian tribes, and, historically has been used primarily for approval of attorney contracts with Indian tribes.

In addition, individuals who were involved in the approval of those agreements have also thought that the 1938 act, while it speaks only to leases, that Congress must have or should have been understood to have authorized the kinds of agreements that are now prevalent today for the development of minerals; that is, nonlease joint venture agreements. However, as the Northern Cheyennes and ARCO discovered in 1980, Solicitor Clyde Martz questioned whether that kind of broad reading of the 1938 act was justified. I think it is a matter on which lawyers could debate endlessly, and, certainly, have been involved in a number of those debates on both sides. We need this matter cleared up so that the legal authority for these kinds of agreements will no longer be questioned.

Senator MELCHER. I take it there have been no court cases?

Mr. VOLLMANN. There have not.

Senator MELCHER. You don't seem to be very enthusiastic, Mr. Secretary, about the provision for Presidential review of the Secretary's decision. What appeal process would you recommend?

Mr. SMITH. Well, Mr. Chairman, as I understand, we presently have an administrative process of appeal whereby an appeal from the decision of the area director goes to the Deputy Assistant Secretary

in charge of operations. Then, the next appeal would go to the Interior Board of Indian Appeals which would deal with the administrative appeal. We feel that the process is adequate. We do not believe an appeal to the President is necessary.

Senator MELCHER. Well, we have Secretary approval, so an appeal process that is under the Secretary does not seem to me to be much of an opportunity for an appeal, to be candid.

Mr. SMITH. Well, naturally we would delegate authority. As I indicated before, this would be the first statute of this kind that would permit an appeal to the President. We do not know whether that would be possible or not. We feel we have an adequate existing appeal process within the Department of Interior to deal with the question.

Senator MELCHER. Well, at what point could the tribe, if it wanted to appeal, get to a court?

Mr. SMITH. To take it to court, I suppose I would have to—Tim, could you maybe respond to that for the chairman?

Mr. VOLLMANN. Well, once the administrative appeals are exhausted, a tribe or an aggrieved party could attempt to take the matter to court, I think each case has to stand on its own merits as to whether the court would have jurisdiction or not, but it is certainly conceivable that a court would have the power to judicially review this kind of action. It is difficult for me to speak in hypothetical terms because one can imagine situations where a court may not have jurisdiction.

Senator MELCHER. Well, this point has come up. What if the tribe disagrees with the Secretary's decision; is that the end of it? It seems to us that an appeal within the Department itself does not really solve anything because they assume that when you get the Secretary's decision that is the end of the Department's judgment, and it is not likely to change. So, we were just seeking a provision that would allow the tribe flexibility. This is what we are seeking in the bill itself, to give them the option of making a determination on what they think a good contract is for them and for their purposes in their Indian self-determination.

I don't know whether under existing law, a tribe really has much standing in court on this matter.

Do they, Mr. Vollmann?

Mr. VOLLMANN. Well, there is a special provision in title XXVIII of the United States Code which gives Federal courts a certain amount of jurisdiction to hear complaints brought by Indian tribes. Indian tribes have been successful in the past in challenging actions of the Secretary through the judicial review mechanism of the Administrative Procedures Act. In fact, we just lost a case in Arizona on a business leasing issue.

Senator MELCHER. How long did it take? Was there expedited review by the court?

Mr. VOLLMANN. I believe the decision by the U.S. District Court in Arizona followed a decision of the Interior Board of Indian Appeals by about 1 year roughly.

Senator MELCHER. How long did the Indian Board of Appeals take to consider the matter?

Mr. VOLLMANN. I can only guess. I only had tangential involvement in this particular appeal. I think it was about 6 months.

Senator MELCHER. Will the Justice Department appeal the decision of the district court?

Mr. VOLLMANN. No final decision has been made on that.

Senator MELCHER. But if they did, that could be another year; could it not?

Mr. VOLLMANN. Oh, yes.

Senator MELCHER. Then if they were not satisfied with that, they could go to the Supreme Court, which could take another 2 years; could it not?

Mr. VOLLMANN. I do not deny that.

Senator MELCHER. So, we have a tribe trying to establish an agreement they find meritorious, and we have the Indian self-determination policy, both in the Congress and in the executive branch of Government. We have to rather stretch out to reach that final point when Indian self-determination will prevail if it is contrary to what the Secretary finds as the best position under trust responsibility.

That is the reason we are seeking a different route for an appeal from the Secretary's position.

Mr. Sampsel, did you want to add to this?

Mr. SAMPSEL. Yes.

Mr. Chairman, I can see that the desire of the committee to insure the quickest possible review of a decision of the Secretary not to enter into an agreement after reviewing the agreement put before him.

I think it is important though, that the record show that there is no intent on the part of the Secretary to do anything except to assist those tribes in entering into the agreements by which they would be able to develop their energy or nonenergy resources in a way that would add to the self-sufficiency of the tribe and improve its economy and its development.

If an agreement was denied approval, it would be based upon the exercise of the judgment of a prudent trustee in reviewing the agreement and determining that it was not in the best interest of the tribe and its members, or that the agreement was flawed. The intent would be always to assist the development and the self-determination of the tribes, and not to use such reviews as stumbling blocks for development. So, anything that this piece of legislation can do to enhance that would be welcome. We simply find the concept of having an appeal to the President from the Secretary's decision not to be any more appropriate than the existing administrative appeal system. If the existing appeal process is inadequate, then the courts, of course, could be used if they had jurisdiction.

I am concerned that the committee and the tribes understand that our support of the legislation is very firm. However, we see no advantage to having an appeal to the President.

It would be our desire—and this is important for the record also—that approval or disapproval of these agreements be handled at the lowest level within the bureaucracy possible. We believe that the agreements should be worked out within the area and regional offices and, in some cases, within the agency offices so that there is no need to come and work out these agreements with the Secretary. We believe that such authority shall be exercised at the lowest possible level within the organizational structure.

Senator MELCHER. In other words, you see that Presidential review probably would not reverse Secretarial findings anyway?

Mr. SAMPSEL. It might, but no more than the existing process that we have for administrative appeals. In other words, I think if the findings of fact are laid forth, and if the Secretary is found in error in his discretion as a prudent trustee, then a decision can be corrected in the existing process.

Senator MELCHER. What would be the basic elements of regulations that would be promulgated by the Secretary if this bill were to become law?

Mr. SAMPSEL. That is an excellent question, Mr. Chairman.

I do not believe extensive regulations would need to be promulgated as a result of the passage of this legislation.

Senator MELCHER. At what point do you think the Department itself would be involved in the negotiation of the terms of the contract, during the formulative stages of negotiation with the company or companies involved?

Mr. STEVENS. I think this is usually a tribal option. The tribe decides the extent of involvement that they want the Bureau to have on the initial level, and who they want to get for their advisers. It would be well if the Bureau were involved in the earliest stages so that if we saw problems, we would be able to solve them before they become very large.

Senator MELCHER. Would the regulations themselves address that point?

Mr. STEVENS. I doubt that very much, sir. Under the present leasing act, the Bureau involvement in the negotiations between a tribe and a mining company, for example, is pretty well at the discretion of the tribe.

Mr. SMITH. Mr. Chairman.

Senator MELCHER. Yes, Mr. Secretary.

Mr. SMITH. I might add that I think Mr. Stevens made a good point. The BIA should get involved as early as possible. Since I have come to Washington, I have been able to review some of the decisionmaking that we have to do here in Washington. I have observed that, at times, a tribe has bypassed the director of the area office, and then we have to start the whole thing all over again by having the central office review the project. I know that when I was in Warm Springs, on any large project, we learned to get the Department involved at an early date so they could spot all potential problems and then resolve those problems on a local basis. Then, by the time it arrived in the area office or Washington, D.C., the Department had aready been through the process of reviewing it and it was usually a go. I find at times that we are not involved until at the last minute, and then it just tacks on a longer period of time for us to review it. So, we would push to have our local superintendents and area directors involved at an early stage in the process.

Senator MELCHER. It is a little bit unclear whether the Department, in entering the negotiations in an advisory capacity, normally sets the terms of the contract. We are trying to give flexibility here, on the one hand, and maintaining the trust responsibiily on the other hand. It is unclear as to what the tribes could expect in terms of that flexibility as

far as the Department is concerned. We have that pretty much wide open in the bill, as I read this language.

Mr. SMITH. I do not think we are restricting the terms here or anything, because I think if you enter into these types of agreements, you need flexibility. We would support full flexibility. However, I believe the terms of the initial agreement should be agreed upon between the parties.

Senator MELCHER. In other words, you see under the language of the bill, as it is right now, that the Department's role would be one of safeguarding against flaws in the contract; against conditions that might, for the long run, in the judgment of the Department, be disadvantageous for the tribe; is that it?

Mr. SMITH. Yes.

Senator MELCHER. All right. Thank you very much. Your prepared statement will be made part of the record at this point.

[The statement follows:]

PREPARED STATEMENT OF KEN SMITH, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. Chairman and Members of the Committee, I am pleased to present the views of the Department of the Interior on S. 1894, A Bill "To permit Indian tribes to enter into certain agreements for the disposition of tribal mineral resources, and for other purposes." We recommend that S. 1894 be enacted if amended as suggested herein.

S. 1894 would allow any Indian tribe to enter into any joint venture agreement or other agreement described in the first section of the bill approved by the Secretary of the Interior for the disposition of oil and gas, geothermal, or other mineral resources of tribal lands, or for the sale of production from operations on tribal lands. Such agreements would conform to regulations prescribed by the Secretary. The Secretary would approve any agreement within one year of submission unless the Secretary found that the agreement was not in the best interest of the tribe. Upon disapproval, the Secretary would state his findings in writing within thirty days of his decision. The tribe would then have thirty days in which to file a request for Presidential review of the decision.

S. 1894 would also provide that individual Indians owning trust or restricted minerals within the boundaries of a reservation subject to an agreement entered into pursuant to the Act may join in the agreement with the tribe, subject to Secretarial approval. The Secretary, at his discretion, could also approve joint venture agreements or other agreements for individual Indians owning trust or restricted minerals.

Finally, S. 1894 would ratify agreements of the types described in the first section that were approved prior to enactment and would provide that nothing in the bill would affect the validity of any lease approved heretofore or hereafter pursuant to the Act of May 11, 1938. It would also direct the Secretary to promulgate rules and regulations to implement the above provisions within 180 days of its enactment.

Mr. Chairman, at the present time, the most frequently used authority for the development of Indian tribal mineral resources is the Omnibus Indian Mineral Leasing Act of May 11, 1938, which is codified beginning at 25 U.S.C. 396a. Section 396a permits the leasing of tribal land for mining purposes for a term not to exceed 10 years and so long thereafter as minerals are produced in paying quantities. Leases are executed by the tribe subject to the approval of the Secretary. Section 396a requires, in most instances, that oil and gas leases be offered for sale by advertisement followed by competitive bidding.

We believe that the maximum term for leases prescribed by section 396a is undesirable for two reasons. First, with many mining leases, the 10 year exploratory period is insufficient for development to begin. Second, the "production in paying quantities" clause, in effect, gives lessees a perpetual lease when minerals are discovered. This latter aspect was identified as a major problem with current leasing practices for tribal lands by Task Force Seven of the American Indian

Policy Review Commission in its 1976 "Report on Reservation and Resources Development and Protection."

Experience has shown that the requirement in section 396a of competitive bidding for the leasing of tribal oil and gas does not always work to the advantage of the tribes. Certain tribes which have been able to negotiate oil and gas development agreements appear to have received greater compensation than they had been receiving under competitive bidding.

The most serious problem with section 396a, however, is that it authorizes development of tribal oil and gas resources only by leasing, ignoring the possibility of joint ventures, joint production agreements, risk service contracts and other non-lease ventures which are commonly used in mineral development today. Such non-lease ventures can provide the vehicle by which tribes can become directly involved in management decisions. The normal lease arrangement merely turns over responsibility for all development decisions, thereby enabling them to gain management experience and contributing significant to the goal of self-determination.

Since 1975, the Department has approved a number of non-lease ventures involving the development of mineral resources, pursuant to section 81 of title 25. That section requires the approval of the Secretary of the Interior and the Commissioner of Indian Affairs for contracts for services relative to Indian lands. We believe section 81 is inadequate to solve the problems posed by the 1938 Act discussed above. First, because section 81 does not apply to leases, it leaves intact the limitations in the 1938 Act. Second, the approval procedure for non-lease ventures under section 81 is cumbersome. It requires a case-by-case analysis to determine whether the document submitted for approval is a service agreement within the purview of section 81 and does not convey a leasehold estate within the purview of the 1938 Act, or an interest in land within the Indian Non-Intercourse Act (25 U.S.C. 177). Third, with the proliferation and hybridization of non-lease ventures, it is increasingly difficult to make the determination described. Without clarification of the Secretary's authority and ratification of existing ventures, some non-lease ventures previously approved may be called into question. Moreover, because of the confusion concerning the Secretary's authority to approve non-lease ventures the Department is reluctant to approve a number of proposed agreements which are pending.

We believe that enactment of S. 1894 with the amendments we propose would provide a means for the United States to promote tribal self-determination in the development of Indian mineral resources. The bill would leave to regulations the establishment of maximum terms for, the conditions of, and the manner of entering into non-lease agreements. We support this procedure because it permits the authority granted by the legislation to adapt to changes in the minerals industry and to respond to the particular requirements of numerous types of non-lease ventures.

In our report to the Committee, we suggested some amendments including: An amendment to clarify the legislative intention that the bill applies to all mineral resources; clarification of the one-year time limit for approval of agreements submitted to the Secretary; deletion of the requirement of Presidential review of the Secretary's decisions; the narrowing of the scope of the ratification provision in section 3; and the addition of a provision holding the Federal Government harmless from liability in the event a tribe suffers damages alleged to have arisen as a consequences of approval by the Secretary of an agreement authorized by the bill.

This concludes my prepared statement, I would be happy to answer any questions you may have.

Senator MELCHER. Next is Carol Dinkins, Assistant Attorney General, Land and Natural Resources Division, Department of Justice.

Please proceed.

STATEMENT OF CAROL E. DINKINS, ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE

Ms. DINKINS. Good morning. Thank you for the opportunity to appear, Mr. Chairman.

My name is Carol Dinkins; I am the Assistant Attorney General for the Land and Natural Resources Division at the Department of Justice.

As the previous testimony made clear, the administration favors enactment of S. 1894 provided that it is amended in accordance with the recommendations of the Department of the Interior.

As indicated earlier, the purpose of this bill is to provide Indian tribes greater flexibility with respect to the production of their mineral resources.

In contrast to the Indian Mineral Leasing Act of 1938, which permits only leasing, the legislation being considered today would make leasing as well as a number of other contractual options, such as joint ventures and joint production agreements available to the tribes.

Moreover, S. 1894 promotes direct participation by the tribes in negotiating these contracts, thereby promoting their economic self-determination.

It is worth emphasizing that enactment of this bill in no way precludes a tribe from pursuing competitive leasing of its mineral resources under the 1938 act.

The changes to the bill, as outlined by the Department of the Interior, are designed to clarify the purpose of the bill, to improve its effectiveness and to avoid unnecessary litigation. These amendments do not reflect any policy differences with the sponsors of S. 1894.

The Department of Justice joins the Department of the Interior in recommending enactment of S. 1894, together with the proposed changes.

That concludes my remarks, Mr. Chairman.

Senator MELCHER. What is the Department of Justice's view on the section dealing with retroactive approval of the existing agreement?

Ms. DINKINS. Mr. Chairman, we believe that that approval retroactively is needed. We support the amendment that is proposed by the Department of the Interior. We believe it tightens up the language and makes clear that it is intended to address the types of agreements that Interior described.

Senator MELCHER. That is, since 1975?

Ms. DINKINS. Yes, sir.

Senator MELCHER. Thank you very much.

Ms. DINKINS. Thank you, Mr. Chairman.

Senator MELCHER. Our next witness is Ed Gabriel, executive director; and John Butler, senior economist, Council of Energy Resource Tribes.

STATEMENT OF ED GABRIEL, EXECUTIVE DIRECTOR; AND JOHN BUTLER, SENIOR ECONOMIST, COUNCIL OF ENERGY RESOURCE TRIBES, WASHINGTON, D.C.

Mr. GABRIEL. Mr. Chairman, we want to thank you for giving us the opportunity to testify before you today on S. 1894.

Let me say at the outset of our testimony that we wholeheartedly support the legislation. There are a few concerns we have, and we would like to summarize those to you, but we do wholeheartedly support the intent of the legislation.

Just a brief background on what we see as the intent of the legislation and why tribes have been entering into various forms of new agreements. In doing so, such agreements were found to be illegal because of outdated Interior rules and regulations.

We feel that the passage of this legislation would basically give the tribes the intent that Congress and the administration have always wanted for them and that is to enter into better terms of agreements for their own benefit.

I would like to just summarize our comments very quickly. In regard to section 3 of the bill which would ratify the agreements approved by the Secretary of Interior, we are in agreement with the views that Northern Cheyenne expressed last month at the Billings hearings; that the section, as currently drafted, goes well beyond what we believe to be the legislative intent.

This section would provide unconditional approval by Congress of every term and condition of an existing agreement. Therefore, we believe that this section must be revised to address the Secretary of Interior's authority to approve these prior agreements rather than the agreements themselves.

The language that has been circulated by the Northern Cheyenne Tribe is worded as follows:

> The approval of any agreement for the development and production of oil, gas, geothermal, or other mineral resources on tribal lands that does not purport to be a lease that was given by the Secretary between January 1, 1975 and the date of enactment of this Act is hereby ratified, and the agreement to which such approval is related shall be effective on the date on which the Secretary approves such agreement.

Basically, we are trying to keep away from unconditional approval of every term but rather to just have approval for the prior agreements to be given by the Secretary of Interior rather than the agreements themselves.

The second point we would like to make is that we believe that the 1-year period allowed in section 1 for the Secretary of Interior to make his decision on proposed agreements is far too long. Such a prolonged period of unnecessary delay could jeopardize the tribe's opportunity to enter into a favorable development agreement.

Secretary Smith earlier said that the EIS process does take sometimes nearly more than a year. Our experience is that oil and gas agreements though take less than a year; about 6 months through the environmental review process. Coal and uranium may take 1½ years. Therefore, our feeling is that conditional approval on the economic terms of the deal can be given within 60 days. Therefore, we believe that such language in the legislation for conditional approval on the economic terms only be granted pending the environmental process, but in no case longer than 1 year.

If the EIS can be approved sooner, fine; if it cannot, 1 year is long enough time for the deal to be approved.

The third point we would like to make is that we are concerned that the consideration of agreements negotiated by tribes and submitted to the Secretary prior to the promulgation of rules and regulations as required by section 5 of this legislation could be jeopardized by unnecessary delays.

Section 5 does allow the Secretary 180 days to promulgate rules and regulations after the enactment of the act. Combined with the 1-year approval period allowed in section 1, which we just mentioned, 1½ years are allowed before the Secretary is required to make this decision on existing agreements. Further, there will be even further delays in the rulemaking process, considering the past history of the Bureau, in promulgating rules and regulations on mineral agreements.

To assure that these agreements are not subjected to unnecessary delays, CERT believes that the following provisions should be added at the end of section 5. This will allow the agreements that have already been conditionally approved or have been sent to the Secretary for his approval to be approved as soon as the act goes through. The words are as follows:

Provided, that the Secretary shall not refrain from processing or withholding for approval any agreement now pending before the Secretary on the date of enactment of this Act or submitted subsequently for Secretarial approval on the basis that such rules and regulations have not been promulgated.

The fourth point we would like to bring out is that we are concerned that in developing rules and regulations to implement this act, there is a danger that the Department will go beyond its authority in defining the types of agreements in specific terms and conditions of such agreements which would be approvable. The purpose of the bill, in our opinion, is to provide tribes with the flexibility to make their own decisions and to allow them to be innovative in the development of their agreements.

We believe that to try to develop uniform standards for every agreement is inappropriate economically. Also, we do not believe it is the intent of this committee to have the Department develop such specific criteria. We would therefore urge the committee to include in its report on the bill explicit language clarifying it is the committee's intent that implementing rules and regulations promulgated by the Department are to include procedural matters and general approval criteria only, but should not attempt to define in detail the types of arguments or terms or conditions of agreements which are approvable.

The last point we would like to bring up that we think is important for this committee to consider is that the bill should include a requirement that tribes provide for public notification of their intent to enter into agreements. Such notice would provide a chance for all interested parties to indicate their interest in beginning negotiations with a given tribe and would therefore enhance the tribe's competitive prospects for entering into agreements.

The point here is that sometimes a council is confronted with a very fast and furious deal that has not been given a fair chance of competition. We feel that a tribe should have the opportunity and should be given the opportunity to advertise its terms and conditions, or, at least, advertise its intent to develop a given area of land. This, we believe, will enhance the competitive nature of the deal.

Now, that is not to say that we are advocating the old form of lease bidding; sealed lease bidding and public auction. We are not saying that. We just think that there should be public notice before a tribe enters into the deal.

In conclusion, just let me say that, as I said before, we are wholeheartedly in support of the bill. We have a few specific concerns that

we believe can be worked out and the bill should be able to go through in a fairly quick period of time.

But let us end on one note. CERT has experienced, in working with the tribes, a great deal of need by the tribes to develop its capacities to manage these kinds of deals. We are going from a lease to an equity ownership of the mineral which requires new accounting, new management, new administration on the tribe's behalf. This, of course, we support because it is giving the tribes much more income, much more working interest and, hopefully, more self-determining mechanisms for itself. However, as the tribes are now going through these changes, the real problem is that funds are being cut from programs that are helping them make such transitions possible We urge that this committee understand that the tribes are going to need the necessary technical and financial resources to help them make the transition from the simple lease procedures to these new kinds of equity deals through funding such as the Department of Energy's funding, and also ANA's funding at HHS.

With that, I would like to conclude my testimony.

Thank you, Mr. Chairman.

Senator MELCHER. Your testimony brings up three points which I want to pursue. First of all, your first concern regarding the Northern Cheyenne Tribe: if there is going to be anything retroactive in the bill such as section 3 now proposes, the Secretary of the Interior's authority to approve prior agreements would be based upon the terms and conditions of the existing agreements because that is the very essence of the Secretary's trust responsibility. How do you get around that? He cannot approve anything under a trust responsibility unless he looks at the terms and conditions.

Mr. GABRIEL. It is my understanding that he has approved the terms and conditions of the Northern Cheyenne Agreement.

Senator MELCHER. That is true.

Mr. GABRIEL. Is that the question?

Senator MELCHER. Yes, that is true, I think. I believe it is.

Mr. GABRIEL. What we are suggesting is that the Secretary examine and approve the terms of the agreement and it is within his trust responsibility to do so. But what we are saying is that we want to make sure that that is all he is doing. Our point in section 1 is to make sure that Congress is not closing the door to any future consideration of the deal or need to reexamine it later on. We do not want it to sound like it is a legislative intent to sign, seal, and deliver the Northern Cheyenne deal forever, and that we would have to go back to Congress in order to change a specific term. We do not want that to be the intent.

Senator MELCHER. Well, since the Secretary believes that he had the authority under—what was it, section 81 of title 25?

Mr. GABRIEL. Yes.

Senator MELCHER. Maybe we should make a finding that such authority did rest with the Secretary and this merely adds to that authority.

Mr. GABRIEL. Right. New kinds of deals, and that is all we are suggesting.

Senator MELCHER. Point No. 2, which you made might put us in an impossible situation. You say the 1-year period is far too long for

the Secretary to either approve or disapprove an agreement, but I fail to understand how the Secretary can avoid being subject to the National Environmental Policy Act.

Mr. GABRIEL. We are not suggesting that he not be subjected to that. We are saying that the economic terms of the deal can be approved pending the EIS process. In other words, why should we hold up a company and a tribe concluding an economic deal for 1½ or 2 years perhaps, when in 60 days approval for the economic terms can be given. We are saying that a conditional approval be given pending the EIS process.

Senator MELCHER. Well, the National Environmental Policy Act, and I have bumped into it several times, also requires consideration of alternatives which certainly involve the economic conditions.

Mr. GABRIEL. It would involve the engineering and capital costs and socioeconomic conditions, but I do not know if it would really give——

Senator MELCHER. You have to separate socioconditions from economic conditions under NEPA.

Mr. GABRIEL. Yes.

Senator MELCHER. I do not believe they go together necessarily at all. I do not understand how the Secretary under NEPA could provide that judgment without looking at other economic alternatives.

Mr. BUTLER. Mr. Chairman, I believe—our intent here is not in anyway to revise the action itself, which is the approval consideration of the term and condition as NEPA would apply to that action. All we are saying really is that the consideration of the economic terms and conditions of the agreement itself, there needs to be some exchange of information from the Secretary to the tribe involved as to whether or not there is a problem with that given economic term and condition.

Senator MELCHER. Well, those are merely advisory.

Mr. BUTLER. In an advisory capacity, basically. We grappled with this problem. We recognize the desire of most tribes for expeditious action. We also recognize the practical procedural difficulties and the like, and the substantive problems of preparing an environmental assessment on environmental impact statements. So, as a compromise, we were just suggesting an advisory sort of action by the Department—from the Department to the tribe giving them, at least, a conditional indication of the approvability of the economic terms and conditions of the lease.

Senator MELCHER. Well, first of all, I think most of what we are considering probably would be considered a major Federal action by the Secretary. That seems to say to me that it takes it out of the realm of environmental assessment and puts it in the realm of environmental impact statement. I have never experienced many instances when an environmental impact statement is concluded within a year. Frankly, as long as the bill is silent on the application of NEPA, I think that the Secretary is precluded by law under NEPA from rendering a decision until the environmental impact statement has been completed.

Mr. GABRIEL. That is currently true. The problem that we have is that sometimes there is so long a delay in a company and a tribe knowing if the economic terms of the deal are going to be acceptable that the deal falls apart. We are trying to avoid those problems by having

some conditional advice or approval given on purely the economic terms of the deal. This is something that we——

Senator MELCHER. I think if we are silent on NEPA—and we are silent on NEPA in the bill—I think we have probably gone about as far as we can. It says, "The Secretary shall approve any such agreement within 1 year of submission to him unless the Secretary finds that such agreement is not in the best interest of the tribe." On the one hand, I recognize the tribe involved might very well be under time constraints from the business aspects and the result might be just as you have described in that the deal could fall through because the interest no longer exists after 1 year's time on part of the company. On the other hand, if we legislate that in any case, the Secretary must make his decision within 1 year, I think we are, in effect, saying that in this case, the NEPA process, if not concluded within 1 year's time, would be disregarded. I do not know whether that will fly. We recognized in our first hearing in Billings that we were getting into an area of having the Secretary's finding only being available at the conclusion of compliance with NEPA, and an environmental impact statement could well take more than 1 year.

We appreciate your suggestions on it. I do not know whether we can arrive at a workable language for that and still not be, in effect, amending NEPA.

Your point No. 5 really goes to the competitive advantage of the tribe in making the public notification known. What about a requirement that the tribe notify its members and perhaps hold a referendum on the proposal before approval could be granted?

Mr. GABRIEL. Sir, we talked about this with our board of directors and we believe that to go to the point of holding a referendum on every mineral agreement, in the board's opinion would undermine the powers of tribal government.

We believe that tribal councils have been elected to represent its people, to make its decisions and through the democratic process, such as tribal elections, to make decisions that are representative of the people. However, we also recognize—and the board recognizes—that there should be some kind of public notice to inform all people of the tribal council's decisions. Therefore, we are suggesting that the public notice be given. We are saying that it should be given to tribal members as well as to all interested companies, but we are not going as far as to say that a referendum should be held because we believe that it undermines the power of tribal government and the democratic process that they follow.

Senator MELCHER. Your prepared statement will be made part of the record at this point.

[The statement follows:]

PREPARED STATEMENT OF THE COUNCIL OF ENERGY RESOURCE TRIBES SUBMITTED BY ED GABRIEL, EXECUTIVE DIRECTOR

The Council of Energy Resource Tribes (CERT) greatly appreciates the opportunity to appear today to present our views on S. 1894, a bill to permit Indian tribes to enter into certain agreements for the disposition of their mineral resources. We would like to say at the outset that we strongly support important bill and urge swift and favorable action by this committee.

CERT is a coalition of 34 American Indian tribes which collectively own a substantial portion of the nation's energy resources, including coal, oil, gas,

uranium, oil shale, tar sands and geothermal energy resources. The organization was formed by the tribes in 1975 out of a recognition that the federal government had failed to provide the kinds of technical support essential to the sound management of these resources. It is indeed a sad commentary that Indian tribes, the largest private owners of energy minerals in this country, suffer the worst economic conditions of any group in our society.

While it would appear that prudent development of these resources could provide a base for long-term economic development, this has not been the case. Historically tribes have not had the capabilities or financial resources required to make appropriate decisions regarding the disposition of their resources. Those tribes which have chosen to develop their energy minerals have largely relied on the Bureau of Indian Affairs (BIA) to carry out the planning and lease sales for them. The BIA has in turn sold these resources under standard leasing procedures which all too often included terms not reflecting the true market value of the resources, and which therefore resulted in little or no long-term benefit for the tribes. Recognizing that they were being depleted of one of their few potential sources of income, their minerals, inevitably leading to permanent economic hopelessness, a number of tribes refused to engage in any further leasing until they themselves could assume control of their resources.

We believe that the formation of CERT by the tribes was a powerful indication that they were no longer content to sit on the sidelines while their resources were being taken from them under unfair terms. Tribes are now beginning to build the capacities required to take charge of their own energy affairs by managing their resources in ways that truly benefit their members. A number of tribes are now coming to the bargaining table with energy companies, engaging in hard-nosed, arms length negotiations, and striking agreements which are mutually satisfactory to the tribes and to the companies as well. We are aware of at least a half dozen agreements which have been negotiated by the tribes which are vastly superior to the BIA standard leases. Many tribes are interested in engaging in working interests with energy companies and are willing to take entrepreneurial risks in order to potentially gain major long-term benefits. One CERT tribe, the Jicarilla Apache, has even assumed ownership of certain oil and gas operations on their reservation.

We see this movement of tribes to assume control of their own resources as a major step forward, not just for Indian people, but for all Americans as our country strives to become more independent of foreign energy sources. We believe that S. 1894 is a critical element of this very positive movement. It would remove any question about the authority of the Secretary of the Department of Interior (DOI) to approve agreements which have been negotiated between tribes and energy companies, regardless of the forms of these agreements. We wholeheartedly support this bill and urge every member of this Committee to vote favorably on it. Since we are now in the second half of this legislative session, with many very major national issues yet to be confronted by this Congress, we fear that this bill may wither on the legislative vine unless it receives the strong and swift support of this Committee.

Having voiced our strong supoprt for S. 1894, we must at the same time also state that we have several concerns about the bill as it is currently drafted. We do not believe that these concerns detract at all from the commendable intent of the bill, and we feel that they can be readily resolved through minor changes. These concerns are as follows:

1. In regard to Section 3 of the bill, which would ratify agreements already approved by the Secretary of Interior, we are in agreement with the views expressed by the Northern Cheyenne Tribe at this Committee's Billings hearing that this section as currently drafted goes well beyond what we believe is the legislative intent. This section would provide unconditional approval by the Congress of every term and condition of existing agreements. We believe that Section 3 must therefore be revised to address the Secretary of Interior's authority to approve these prior agreements rather than the agreements themselves.

2. We believe that the 1-year period allowed in Section 1 for the Secretary of Interior to make his decision on proposed agreements is far too long. Such a prolonged period of unnecessary delay could jeopardize a tribe's opportunity to enter into a favorable development agreement. While we believe that the review of the terms and conditions of the agreement itself could be completed within 60 to 90 days by the Department, we also recognize that it may take substantially longer for the Department to fulfill its environmental review responsi-

bilities under the National Environmental Policy Act. To help ensure that the Department responds to the tribes' needs for quick action while still meeting its other statutory obligations, CERT recommends that Section 1 be revised to direct the Secretary to make his decision as expeditiously as practicable, but in no case later than within 1 year of submission of the proposed agreement.

3. We are concerned that consideration of agreements negotiated by tribes and submitted to the Secretary prior to promulgation of rules and regulations as required by Section 5 could be jeopardized by unnecessary delays. Section 5 allows the Secretary 180 days to promulgate such rules and regulations after enactment of the Act. Combined with the one-year approval period allowed in Section 1, 1½ years are allowed before the Secretary is required to make his decision and, in addition, delays in the rulemaking process could delay consideration even further. Given the BIA's record in revising its regulations for Indian minerals (25 CFR Parts 171, 172, 173, 177 and 182), which were first proposed in 1977, reproposed in 1980, but which have yet to be promulgated, we believe this latter possibility is not at all unlikely.

We are aware of at least one tribe which has an agreement pending Secretarial approval. To assure that such agreements are not subjected to unnecessary delays, CERT recommends that the following provision be added to the end of Section 5 of the bill: "*Provided*, That the Secretary shall not refrain from processing or withholding for approval any agreement pending before the Secretary on the date of enactment of this Act or submitted subsequently for Secretarial approval on the basis that such rules and regulations have not been promulgated."

4. We are concerned that in developing rules and regulations to implement this Act, there is a danger that the Department will go too far in defining the types of agreements and the specific terms and conditions of such agreements which would be approvable. The purpose of the bill is to provide tribes with the flexibility to make their own decisions, and to allow them to be innovative in the development of their agreements. It simply would not be possible, nor would it be appropriate, for the Department to define uniform minimum standards for each and every term and condition in such agreements, and we believe that it is not this Committee's intent for the DOI to attempt to do so. We would urge the Committee to include in its report on this bill explicit language clarifying that it is the committee's intent that implementing rules and regulations promulgated by the Department are to include procedural matters and general approval criteria, but should not attempt to define or detail the types of agreements, or terms and conditions of agreements, which are approvable.

5. We believe that the bill should include a requirement that tribes provide for public notification of their intent to enter into minerals agreements. Such notice would provide a chance for all interested parties to indicate their interests in beginning negotiations with the given tribe, and would therefore enhance the tribe's prospects for entering into agreements of maximum benefit.

We see enactment of S. 1894 as an important step to bolster the tribes' efforts to take control of their own affairs. We must also point out, however, that while tribes have made impressive progress in building their own energy resource management capabilities, they cannot be expected to assume all responsibilities immediately. Tribal governments need time to make the transition from almost no involvement in minerals management, as has historically been the case, to assuming a true resource management role. This transition requires the strong support and technical assistance of the federal government, as trustee to the tribes, to help tribes build the capacity to make their own energy management decisions. Unfortunately, cuts in federal programs designed to provide this support, including the Administration for Native Americans' financial and technical assistance programs and the Department of Energy's Indian Affairs Program, may well jeopardize this opportunity for tribes to make this transition, and leave them without the tools that they need to effectively choose their development options, such as those available to them under S. 1894. We urge this Committee to make every possible effort to assure that tribes receive the full federal training and technical assistance that they so vitally need to build effective resource management capabilities.

We again thank you for this opportunity to offer our comments and will be pleased to answer any questions you may have.

Senator MELCHER. Our next witnesses are George Hiwalker, Jr., vice president and Joe Little Coyote, Northern Cheyenne Tribal Council. You may proceed.

STATEMENT OF GEORGE HIWALKER, JR., VICE PRESIDENT, NORTHERN CHEYENNE TRIBE; AND JOE LITTLE COYOTE, ADMINISTRATOR, TRIBAL OIL AND GAS ADMINISTRATION OFFICE, LAME DEER, MONT.

Mr. HIWALKER. Mr. Chairman, I am George Hiwalker, Jr., vice president of the Northern Cheyenne Tribe. I appreciate this opportunity to once again provide testimony on behalf of my tribe regarding S. 1894.

Accompanying me is Joe Little Coyote, Sr., our administrator of the Tribal Oil and Gas Administration Office. Mr. Little Coyote will assist me in answering any specific questions that may be asked by the committee.

Following the hearings held in Billings, Mont., on February 12, 1982, there seems to have been a question formed in some people's minds as to the validity of the oil and gas exploration and drilling agreement between the Northern Cheyenne Tribe and the Atlantic Richfield Co. This may have been due, in part, to the tribe not coming out in full support of the bill, particularly section 3, at said hearings.

The tribe expressed some reservations because section 3, as written, seemed to imply that the Northern Cheyenne Tribe/ARCO agreement was invalid, needing congressional approval. This, of course, was never our intent in originally supporting the need for such legislation. In this regard, the tribe wishes to go on record that it has already taken the position, and continues to do so, that it has a valid agreement with ARCO.

The tribe must, however, point out that from May 20, 1980 until September 23, 1980, it expended vast resources and encountered extreme difficulty in obtaining Bureau of Indian Affairs wide approval of the agreement.

As will shortly be explained in somewhat more detail, the Billings area office of the Bureau approved the agreement on August 21, 1980. However, it was not until September 23, 1980, that the Assistant Secretary for Indian Affairs concurred with the area office's approval. This action, after months of frustrating delay, finally led to the release of ARCO's initial payments to the tribe which were being held by the Bureau, and finally allowed the tribe and ARCO to implement that which they considered a valid agreement from the beginning.

To begin with, in response to a question raised that the people may not be in support of the tribe's decision to enter into an agreement with ARCO, the Tribal Council ordered and held a "vote of confidence" on August 15, 1980, for every eligible voter of the tribe. The results were that the Council received an overwhelming support of 82 percent of the eligible voters voting in favor of the tribe entering into said agreement with ARCO.

Then, on September 15, 1980, in response to an unverified petition for referendum on the Northern Cheyenne Tribal Council resolution approving said agreement, initiated by a small minority of discontented tribal members and supported by the Office of the Assistant Secretary for Indian Affairs, the Tribal Council ordered and held a referendum in which the people again overwhelmingly approved the agreement nine to one with 88 percent of the eligible voters voting.

Accepting the "vote of confidence" as a clear mandate from the Northern Cheyenne Tribe, the Billings area director approved the agreement on August 21, 1980. Shortly after this on August 28, 1980, the Assistant Secretary for Indian Affairs suspended the Bureau's approval and withheld a $7.3 million payment to the tribe.

The tribe and ARCO were then forced to suspend the agreement until certain legal questions, raised by the U.S. Solicitor Clyde Martz, as to the validity of said agreement, could be cleared up. This situation focused on two distinct legal questions, as best as we can recall.

No. 1, the Northern Cheyenne/ARCO agreement was, in fact, a lease and not an agreement contrary to the claims of the Tribe and ARCO that it was an agreement, and that substantial compliance with the requirements of the 1938 Minerals Leasing Act had not been met, which in effect made the agreement invalid.

No. 2, the Secretary of the Interior had no basis in prevailing law on which to approve agreements, and, furthermore, the tribe did not have the authority to negotiate such an agreement on their own because their own constitution did not allow them to do so according to the edict of the 1949 Maston G. White opinion of the U.S. Solicitor's Office.

Although this was a very distressing situation the tribe continued to insist that it had an agreement and not a lease and that its constitution did in fact allow them to negotiate and enter into such an agreement, and that such agreements could be approved under 25 U.S.C. section 81, by the Secretary of the Interior, and further that a number of such agreements had already been approved under said authority. At this point, the Assistant Secretary for Indian Affairs indicated that our agreement was indeed authorizable if it were in fact an "agreement" and not a "lease,"

This question was finally resolved when the tribe and ARCO signed a mutual "Statement of Intent" clearly establishing that said agreement created no property rights in place for ARCO—attached is addendum No. 1—this then made the one clear distinction between what constituted an agreement and what constituted a lease, that is, in this case the standard used to distinguish between an agreement and a lease was that: No. 1, a lease created property rights, and that, No. 2, an agreement did not create property rights like a lease.

In this regard, on September 23, 1980, the Assistant Secretary for Indian Affairs concurred with the prior approval of the Billings Area Director of August 21, 1980, and ordered that said agreement was in full force and effect.

In collaborative consultation with Senator Melcher's office, the tribe, the Department of the Interior, and ARCO agreed that a legislative solution was required to remove any uncertainty that may exist regarding the Secretary's approval authority to approve such agreements, and to provide Indian tribes with a clear alternative to the 1938 Minerals Leasing Act should they find it in their better interests to seek such an alternative.

Our tribe certainly welcomes this new dawning in U.S. policy for Indian tribes through Senate bill 1894 which has long been overdue. Although in principle, we agree with the bill, the tribe has a number

of concerns and needs which it would like to present to the committee in hopes that they are addressed in its final form and passage:

No. 1, the tribe feels that section 3 of the bill should be rewritten in a way that does not imply that the Northern Cheyenne Tribe/ARCO agreement or any other existing agreement is invalid and needing congressional approval, and also in a way that does not restrict the tribe and Atlantic Richfield Co., from modifying the agreement in the future should they find it mutually necessary and agreeable to do so.

As it is written it seems to lock up into a compact that can only be changed with congressional approval.

The tribe has met with ARCO, and we can confirm that it was not the intent to seek congressional approval of said agreement, but would prefer congressional affirmation of the Secretary of Interior's approval authority to approve of said agreement(s). This tribe has already taken the position, and continues to do so, that it has a valid agreement with ARCO.

No. 2, the tribe requests that upon passage of the bill, Indian tribes be invited to participate in the drafting of the regulations under which said bill is to be implemented.

The tribe finds existing regulations wanting in every respect in regards to not only the protection of its vital interests, but also in regards to the much espoused U.S. policy of self-determination for Indian tribes. We feel that the regulations should afford Indian tribes much larger participatory roles in the protection, control and management of their vital interests under the alternative mechanisms it proposes.

In other words, our tribes seek a much larger role and participation in the trust responsibility charged to the Secretary of Interior; and, we also seek the financial and technical resources necessary for building the systems to carry out such an expanded tribal role should the opportunity be given.

No. 3, although the proposed bill holds out the promise of a much welcomed alternative to the 1938 Minerals Leasing Act, we also feel that Indian tribes ought to be provided with an opportunity to enter into international markets for the sale of their natural resources where there is no restrictive U.S. policy on the energy industry. It is felt that only in this way can Indian tribes be assured a fair market value for their resources and secure true equity to their people.

No. 4, the tribe requests that the language in the bill referencing ". . . or other mineral resources," be changed to: ". . . or other natural resources owned or controlled by Indian tribes." At present the tribe finds itself being hampered in the beneficial use of all its natural resources by the same restrictions prompting Senate bill 1894, such as timber, gravel, agriculture, lands, and so forth.

In the event the committee finds that it is not possible through this bill to address our concerns, Nos. 3 and 4, in all or in part, the tribe would offer a suggestion that the committee institute parallel proceedings to fully address them at a later date.

In summary, the tribe continues to insist that it has a valid and equitable agreement with ARCO. The tribe, however, feels that proposed Senate bill 1894, as presently written, does not address concerns

that are highly important to the tribe; and, if not addressed, could have serious bearing on our future as a Northern Cheyenne people with a homeland that we would very much like to keep forever.

In conclusion, we are aware that this bill will not be the solution to all our problems as an Indian tribe. It should, however, speak to the needs we feel are essential to our continued tribal solvency and for what we believe is essential to our drive for relative social and economic self-sufficiency.

Thank you.

Senator MELCHER. Please remain at the witness table. We are going to have a very short recess of about 2 or 3 minutes.

[Recess taken.]

Senator MELCHER. The hearing will come to order.

George, there were two referendums by the tribal members; the first one on August 15. I believe, on page 3, you described a vote of confidence on August 15, 1980, for every eligible voter of the tribe?

Mr. HIWALKER. Yes.

Senator MELCHER. You say that the results were that the Council received the overwhelming support of 82 percent of the eligible voters. Does that mean 82 percent of those voting? What were the results?

Mr. HIWALKER. No. Of the eligible voters. It means 82 percent of the eligible voters.

Senator MELCHER. Who are the eligible voters? What are the requirements to be an eligible voter?

Mr. HIWALKER. Members of the tribe 18 and over.

Senator MELCHER. And what were the results of that referendum? What was the actual vote count?

Mr. HIWALKER. Just a minute, we will get that for you. The vote count was 1,138.

Senator MELCHER. Did they all vote "yes?"

Mr. HIWALKER. Of that figure, 80 percent is the—82 percent voted in favor of the agreement.

Senator MELCHER. How many eligible voters are there?

Mr. HIWALKER. Approximately 2,433 at the time.

Senator MELCHER. There are 2,433. So, those that voted were actually less than half of the eligible voters? Every member of the tribe is eligible to vote as long as they are 18 or over. Does that mean that those eligible are 2,433?

Mr. HIWALKER. I believe that is the correct figure, 2,433.

Senator MELCHER. And 1,138 voted, and of those that voted, 82 percent voted in favor?

Mr. HIWALKER. Right.

Senator MELCHER. Then, on September 15, there was another petition for referendum?

Mr. HIWALKER. Yes.

Senator MELCHER. On September 15, 1980, a second vote was taken and how many voted on September 15?

Mr. HIWALKER. The figure was approximately 1,031.

Senator MELCHER. And of that number, 88 percent voted in favor?

Mr. HIWALKER. Eighty-eight percent voted, and the vote was in favor of the agreement.

Senator MELCHER. These were both advertised with public notice given?

Mr. HIWALKER. Yes.

Senator MELCHER. What are the requirements of the tribe under the constitution for referendum?

Mr. HIWALKER. We will have that in a minute.

I will have Mr. Little Coyote respond to that.

Senator MELCHER. OK.

Mr. LITTLE COYOTE. Mr. Chairman, this is from the amended constitution bylaws of the Northern Cheyenne Tribe. The Northern Cheyenne Indian Reservation, article VIII, section 1 of referendum:

> Upon a petition signed by at least 10 percent of the registered voters from each district, a referendum may be demanded on any tribal adoption of a person or the elimination of a person from the tribal roll or on any proposed or enacted ordinance or resolution of the tribal council and the vote of the majority of the qualified voters voting in such referendum shall be conclusive and binding upon the tribal council provided at least 30 percent of the eligible voters shall vote in such referendum.

Senator MELCHER. Does that give the terms of the notice?

Mr. LITTLE COYOTE. No, sir.

Senator MELCHER. Thirty percent did vote in each instance. That meets the first requirement?

Mr. LITTLE COYOTE. Yes, sir.

Senator MELCHER. And on August 15, slightly more of the eligible tribal members voted?

Mr. LITTLE COYOTE. Yes, sir.

Senator MELCHER. And 82 percent on August 15 were affirmative and supported the Council's action?

Mr. LITTLE COYOTE. Yes, sir. I might add, sir, that at the time, the tribe met with the Assistant Secretary of the Interior and received a clarification from the U.S. Solicitor on this referendum. At that point, the tribe did agree to hold a referendum. However, the resolution that was submitted by this small minority requesting the referendum had other requests that were not acceptable to the tribe. They submitted a resolution which contained all these other requests in addition to the referendum, which we could not approve. However, the tribe took it upon itself, or the tribal council took it upon itself to go ahead and hold this referendum, and also held a meeting in each district on the reservation prior to the referendum explaining the terms and conditions of the agreement in Cheyenne language. It took special pains to notify the people prior to the referendum.

Senator MELCHER. That would be which referendum, the August 15 or September 15?

Mr. LITTLE COYOTE. The September 15 referendum, sir.

Senator MELCHER. There were 1,138 voters in the first referendum and a little over 1,000 on the second referendum. I think you stated, George, 1,031 on the second referendum. This meets the requirement of 30 percent, but in neither case does it constitute a majority of the eligible voters that you have described. I wonder why that is? What is the tribal enrollment?

Mr. HIWALKER. Approximately 4,200 at the time.

Senator MELCHER. Is this typical?

Mr. LITTLE COYOTE. Yes, sir. Approximately 65 percent of our tribal membership can be considered between the ages——

Senator MELCHER. Ages of 18 and older?

Mr. LITTLE COYOTE. Yes.

Senator MELCHER. And, therefore, are eligible?

Mr. LITTLE COYOTE. Yes.

Senator MELCHER. That means that 2,433 is probably an accurate figure of those eligible, but is it typical that less than half of those eligible actually vote in a referendum?

Mr. LITTLE COYOTE. Yes, sir. This is the largest turnout that we have had even for tribal elections for tribal council and for the chairman.

Senator MELCHER. I see. I find that while you make the point, George, on page 8, of a valid agreement with Arco, I do not think that has been questioned by the bill, and certainly is not our intent. But, I find it rather difficult, as I have explained both in Billings and here, to even propose any retroactivity in a bill. However, for the purposes of facing the practical effects of the bill, such as this, we have included section 3. But perhaps, since you have outlined for us the discussion with the Solicitor in the Bureau of Indian Affairs regarding the agreement as being valid under section 81 of title XXV and, as the Department witnesses and CERT have previously testified that they feel that it was valid under section 81 of title XXV, perhaps all we need to do is to enlarge upon this bill by furthering the authority that the Congress finds was available to the Secretary under that particular section of the law. That seems to be your point, that you feel that the secretarial action was valid under section 81, title XXV, and that you were so advised by the Solicitor's office at the time; is that correct?

Mr. HIWALKER. Yes.

Senator MELCHER. Thank you both very much. I appreciate your further testimony and further clarification of the tribe's position on the bill.

Mr. HIWALKER. Thank you, Mr. Chairman.

Senator MELCHER. The addendum to your statement will be made part of the record at this point.

[The addendum follows:]

FACSIMILE

(ADDENDUM #1)

ARCO Oil and Gas Company
Rocky Mountain District
717-17th Street
Mailing address: P.O. Box 5540
Denver, Colorado 80217
Telephone 303 575 7010

Thomas N. Bardette
District Land Manager

Send to: Tim Vollman
Assistant Solicitor
Division of Indian Affairs
Room No. 6413
Telephone No. 343-9331

Please call 343-9331 when received.

August 20, 1980

To: Mr. Anson A. Baker
Area Director
Billings Area Office
Bureau of Indian Affairs
Department of the Interior
Billings, MT 59101

Re: EXPLORATION AND DRILLING AGREEMENT/NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION-ATLANTIC RICHFIELD COMPANY

This letter shall evidence the intent and desire of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation (The Tribe) and Atlantic Richfield Company (ARCO) pertaining to the above subject Agreement between said partic executed May 23, 1980.

Said Exploration and Drilling Agreement is not intended to be nor is it the desire of the parties that said Agreement be deemed, construed or interpreted to be an "Oil and Gas Lease". By virtue and pursuant to said Agreement, The Tribe has no intent and does not grant ARCO any ownership in the oil and gas in place; and, ARCO does not under said Agreement make any claim to the oil and gas in place.

The mutual intent and desire of The Tribe and ARCO in said Agreement is the exploration, discovery, development and production by ARCO of the oil and gas owned in place by the Tribe, pursuant to all of the terms, provisions and conditions of said Agreement.

This letter in no way amends, modifies or otherwise alters said Agreement and is intended only as a clarification of the intent of the parties to said Agreement.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION

BY _____

TITLE _____

DATE _____

ATLANTIC RICHFIELD COMPANY

BY _____

TITLE _____

DATE _____

Senator MELCHER. I think to give us a continuity in our hearing record on this question of the Northern Cheyenne Tribe, it would be best for us to hear now from the members of the Northern Cheyenne Tribe who have testimony regarding the Northern Cheyenne Tribe/ARCO agreement and have comments on the bill itself. I understand a number of them are present.

These are members of the Northern Cheyenne Tribe. I am going to read off the names and all those who are present please approach the witness table: Bill Parker, Clayton Small. Joe Bear, Larry Kindness, and Charles Whitedirt, headsman, Elkhorn Society. Mr. Whitedirt will be accompanied by an interpreter, Wayne Little Whiteman, who is also a member of the Elkhorn Society.

Mr. KINDNESS. Senator Melcher, I am on the list with the Cheyenne group, but I am a member of the Crow Tribe and I came as an individual.

Senator MELCHER. You are a member of the Crow Tribe rather than the Northern Cheyenne Tribe, but you are testifying with this group; is that it? That is acceptable.

Mr. KINDNESS. I am also testifying as an individual for the Crow Tribe.

Senator MELCHER. For the Crow Tribe. All right.

Mr. KINDNESS. I do not have the authority delegated to me by my tribal council to do so.

Senator MELCHER. Well, let us hear from the Northern Cheyenne Tribe members first, and you may remain seated right there at the witness table and we will call you immediately after the Northern Cheyenne Tribe.

Mr. Parker, you may proceed.

STATEMENT OF MEMBERS OF THE NORTHERN CHEYENNE TRIBE: BILL PARKER; JOE BEAR; CHARLES WHITEDIRT, HEADSMAN, ELKHORN SOCIETY, ACCOMPANIED BY HIS INTERPRETER, WAYNE LITTLE WHITEMAN, MEMBER, ELKHORN SOCIETY, LAME DEER, MONT.

Mr. PARKER. My name is Bill Parker; I am a member of the Northern Cheyenne Tribe at Lame Deer, Mont. With me are Joe Bear on my left; Mr. Wayne Little Whiteman, and Mr. Charles Whitedirt, who is the headsman for the Elkhorn Society of the tribe, a traditional society and formerly the arm of the tribal government before the Indian Reorganization Act.

Clayton Small was scheduled to be with us, but he had difficulty making arrangements to be here. He, at tribal district meetings, which are citizen input meetings, was elected as our spokesman; so, the people here have asked me if I would lead out and give the statement that we prepared.

Senator MELCHER. Fine, please proceed.

Mr. PARKER. I would like to speak in opposition to the bill introduced by Senator Melcher of Montana, Senate bill 1894.

In its present form, section 1 of the bill gives too broad a power to Indian tribes, many of whom are not ready to assume such power in developing tribally owned mineral resources.

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Specifically, I oppose Section 3 of Senate bill 1894 because it would clear the way for approval of an agreement entered into by the Northern Cheyenne Tribal Council, which is being contested in tribal court on the Cheyenne reservation.

In addition, section 3 of the bill would not allow the Cheyenne people to take advantage of the purposes of the bill to get the best possible return on their mineral resources.

Section 1 of Senate bill 1894 which allows for an approval of any type of agreement concerning tribally owned minerals opens the door for exploitation of Indian minerals by energy companies who are only concerned with maximizing their own profits; then getting out.

Indian tribes generally are not ready as far as technical expertise and adequate planning to assume the responsibility of long-range resource management. The broad grant of authority in section 1 of Senate bill 1894 might more properly be characterized not as lifting restrictions on Indian tribes, but rather as lifting restrictions on energy companies desiring to exploit Indian minerals.

This act, Senate bill 1894, as written, ignores the trust responsibility of the U.S. Government to insure that Indian tribes receive proper consideration for their resources.

Section 3 of Senate bill 1894 through the retroactive clause of the bill should be stricken completely. That section, as it now exists, would grandfather in agreements entered into prior to the passage of Senate bill 1894 where those agreements could not be approved by the Secretary of Interior when they were initially negotiated because they did not comply with the requirements of the 1938 Indian Minerals Leasing Act.

If the purposes of the bill are to provide a way for Indian tribes to get the best deal for their minerals, then that purpose is not fulfilled by grandfathering in agreements which are essentially the same as the old mineral lease especially where those agreements contain only set rentals which are less than those already being required by the BIA to set royalty rates which are no greater than those presently required by the BIA, and a signing bonus which has never been compared to any other offer.

All existing agreements, if the bill is passed in its present form except for section 3, should be declared invalid.

As to the Northern Cheyenne agreement with ARCO, that agreement is being challenged in tribal court on the Northern Cheyenne Reservation. Making this agreement retroactive without first waiting to see if that agreement is valid under Northern Cheyenne tribal law would be an unwarranted intrusion into tribal self-government and would be in opposition to the long-standing congressional policy of self-determination and allowing Indian tribes to resolve their own internal conflicts.

If this bill, or one similar to it is to be passed, the retroactive effect of section 3 should be completely deleted. Added to the bill should be a provision for appropriation of moneys to tribes to enable them to reach an adequate level of competency in dealing with tribal resources that is now lacking.

Tribes should be allowed to utilize these funds to increase their capabilities and a specific time limit should be set on how soon tribes could

enter into these agreements once training and development programs are undertaken. The tribes need the additional time and additional resources to develop long-range plans and planning capabilities, such as comprehensive planning. This is an added note that should have been in there, such as comprehensive planning. Only then should Federal restrictions be removed.

Finally, tribal resource development should be left to the people of each tribe. It is those people who live with tribal governments and it is the tribal people who live with whatever return comes from resource development. The people of each tribe should be left to establish limitations and safeguards concerning the development of tribal resources.

Before leaving, Senator, it is our understanding that this bill will not alter the power or structure of tribal governments in that it will not automatically grant directly to tribal councils the powers to dispose of mineral resources without complying with applicable tribal laws and restrictions. This is the general overall statement that we have prepared. We have one other statement which we would like addressed to you and we have a third possible, which may answer some questions in regard to the Arco agreement from our standpoint. However, at this point in time, because of its length, we would not read that statement unless we were requested to do so, but only submit it.

Then, I would like to turn it over to Mr. Joe Bear, who is a former tribal vice president of the tribe during the time of the Arco agreement, who has other points that he would like to enter.

[The prepared statement follows:]

PREPARED STATEMENT OF BILL PARKER, MEMBER, NORTHERN CHEYENNE TRIBE

At the hearing in Billings, Mont., during the testimony of Clayton Small in representing the concerns of various of the membership of the Northern Cheyenne Tribe, he was asked by Senator Melcher whether or not the federal government had in any way "coerced" the Northern Cheyenne people into accepting the Atlantic Richfield agreement.

The single word "coerce" can conjure up many images and can, in effect most certainly cause any person so confronted with such an awesome responsibility in such emotionaly charged and time-limited circumstances as we have here now and had at Billings, no alternative but to equivocate in response to such a loaded question.

However, if the word "coerce" is to stand as proper wordage, then one can only respond by beginning from the time of the first European contact with Native American people and follow the psycho-social conditioning of Native Americans from that time forward to the present traumatic circumstances being foisted on our people in respect to "Reaganomics" which has "coerced" the leaders of tribal governments with great natural resource potential to "cozy up" to the captains of the enemy industry and the alleged energy needs of the country in a manner reminiscent only of what happened over the gold fever which caused the invasion of the Black Hills one hundred and more years ago under similar U.S. economic imperatives.

This coercion continues with adverse psycho-social and spiritual effects as a result of abrupt and ceaseless government policy change every four years and with the advent of the tenure of this recent change, in particular, which combines with a self-seeking, outdated, oppressive and entrenched bureaucracy and tribal leadership resulting in an apathetic attitude on the part of most members of the tribe wherein even the most illogical of development propositions can be given enough credence within the framework of expediency to meet: (a) government deadlines for funding; (b) tribal political considerations such as those that bear on re-election.

This apathetic attitude can be demonstrated by the extremely low percentage of voter turnout. At best on the Northern Cheyenne Reservation, it is an historic fact and at the worst can be borne out further by inquiry into other tribes. It

is rare on the Northern Cheyenne Reservation when more than 30 percent of the qualified electorate votes and when any more than 25 percent (owing to disqualification of ballots) actually have their vote counted.

Thus, we find our elected tribal representatives operating with a mandate from less than one in four eligible voters. The council which began the shift towards what can only be called inordinate energy development (such as the Arco deal) was elected on the one man—one vote principle wherein many had a mandate of less than one in ten. Oddly enough, the person who spearheaded the Arco deal was the bottom winning vote recipient.

The lack of separation of powers and an elected judiciary on the Northern Cheyenne does not allow for due process either from the standpoint of custom law nor from legislation. The council (the legislative branch) which makes the laws also hires the judges which, in turn, are administered by the tribal chairman (the executive) who can relieve them of their duties, subject again to final review by the council.

Judicial review of constitutionality of legislation or executive action, has been demonstrated over the Arco situation,[1] in particular to be non-existent as the judiciary has consistently been overruled, relieved of duty (fired), or overtly influenced by the other two branches of government.

Going back to the voting process in respect to the Arco agreement, one will find it of record that the Tribal Council with the Tribal Chairman[2] in concurrence persisted in denying the people a referendum vote as provided for in the constitution, upon submission of a qualified petition until the BIA forced the tribal government to do so and provided funds for said referendum.[3]

The referendum was conducted only after a vote of confidence in lieu of the referendum was held.[4] In both cases better than 600 ballots were sent to off-reservation voters. It is estimated that off-reservation voters out-voted reservation residents by a margin of 200 votes (about 600–400). The vote of confidence assured the tribal government that the referendum would pass. Only when that assurance was in hand did they allow for the referendum vote.

Additionally, that referendum was held despite the fact that no governing procedures were in place and a tribal court injunction[5] was in effect which was illegally overruled in tribal appellate court by the attorney who had helped to negotiate the agreement in a classic conflict of interest situation which found a disbarred attorney[6] on felony probation writing the tribe's brief.

A multitude of glaring errors and inconsistencies are strewn in the path of this Arco/Northern Cheyenne tribe oil and gas agreement which will require a full judicial airing before any legislation is considered such as SB 1894, allowing for the grandfathering of mineral and fossil fuel deals as per Section 3 on Indian reservations, particularly that legislation which would "grandfather" a document such as the Arco agreement into being while litigation is pending.

The Minerals Leasing Act of 1938 forbids this type of agreement and it is expressly upheld in respect to the Northern Cheyenne Tribe by the Solicitor's Office in the Maston G. White opinion of 1948.

A lawsuit[7] currently in process in tribal court on the Northern Cheyenne Reservation drawn by the tribal government itself upon a tribal member over Arco access to his land consistently alludes to the fact in brief, rebuttal and testimony that the agreement is not valid.

The first question which must be asked then is this: Does this legislation which allows for grandfathering constitute an infringement on the judicial processes of this country[8] and secondarily, germane to the agreement itself, is

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[1] See Judge Essman Rejoinder in Northern Cheyenne Tribe v. Gilbert Redneck, Jane Doe 1 through 10, John Doe 1 through 10; et al. Northern Cheyenne Tribal Court.

[2] Tribal Council minutes August/September 1980.

[3] Letters from BIA Area Director Anson Baker, Superintendent John Buffalo Horns, Office of the Soliciter Tom Aevado August/September, 1980. Re: Referendum issue.

[4] Reviewed voting process and results. Vote of confidence August/September 1980. Referendum vote August/September 1980.

[5] See Judge Red Cherries Injunctive Order. August/September 1980—Northern Cheyenne Tribal Court and subsequent Appellate Judge Calvin Wilson ruling overturning Judge Red Cherries.

[6] See Federal Court proceedings/South Dakota District approximate 1978 and subsequent South Dakota Bar Association. Re: Citizens of the United States v. Robert Looby.

[7] See Northern Cheyenne Tribe v. Redneck pending Northern Cheyenne Tribal Court Judge Francis Lame Bull—Ft. Belknap presiding.

[8] Question—Will Section Three of SB 1894 in correcting Executive Action re: ARO/NCT Agreement infringe upon judiciary in respect to the rights of members of the Northern Cheyenne Tribe seeking judicial review of executive action thus violating the constitution prerogatives of the citizens of the United States as provided for in the constitution of the United States in respect to a separation of powers through a system of checks and balances?

the Northern Cheyenne Court System a court of competent jurisdiction in respect to the Indian Civil Rights Act?[9]

And does Custom Law apply in respect to the Martinez Decision of the Supreme Court?[10] How does the present system of Northern Cheyenne government without separation of powers allow for due process and proper judicial review.[11] Particularly when the Northern Cheyenne Constitution specifically alludes to acquiescence to the Constitution of the United States wherein a separation of powers as a system of checks and balances is the very backbone of democracy?

If a judicial remedy to this situation can be furthered, other issues will inevitably surface. One aspect most important in respect to the opening comments of this testimony may very well answer the initial inquiry of Sen. Melcher as to whether or not the federal government "coerced" the tribal government into this agreement.

In 1973 an official tribal request from the Tribal Chairman to the United States Geological Survey was made asking that all technical data generated by prior exploration activity be given over to the tribe as per contractual agreement.[12]

The only viable answer was given several months later in a USGS critique of an oil and gas lease bid offering[13] work-up by BIA wherein USGS stated, in effect, that since USGS had the trust responsibility to provide technical oversight to the tribe, it saw no reason for the tribe to have that technical data on file.[14] This attitude eventually led to the BIA authorization of a $200,000 grant in 1978 to the tribe to conduct what has been referred to as a "covert" operation to gather data (which by law already belonged to the tribe) and to interpret that data in such a way as to allow the BIA to provide another $200,000[15] to the tribe to do seismological work on a suspected "domal structure" in the heart of the reservation which had first been drawn to the tribe's attention by Raytheon Inc. of Wayland Mass. in 1973 through a BIA contract to Raytheon[16] providing for high altitude high resolution photography and interpretations in line with the ERTS satellite project under the auspices of the National Aerospace Administration's Program (NASA) which had produced high-resolution regional imagery.

Even without this remarkable work, it should have been obvious to BIA or USGS geo-physical expertise via USGS topographical mapping[17] that all criteria necessary for surface determinants of a domal structure were present decades before Raytheon's report to the tribe and that the tribe should have been informed in order to make arrangements to explore and to penetrate that anomaly to basement after determining the high-point.

A report to the tribe in 1973 by the author of this testimony, as a member of the then newly-formed Northern Cheyenne Research Project[18] and as a tribal member (however, non-expert in geo-physical matters) detailed these facts and others which were proffered concluding with the unanswered question as to whether or not information had been deliberately withheld from the tribe by the U.S. Government in order to prevent a highly probable oil discovery which would have given us far and away the necessary funds not only to become self-sufficient but also to investigate more fully and litigate against the Federal Government over the coal permit and production lease situation then pending revocation and which has subsequently been resolved by Mr. Melcher.

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[9] Requires a review of credentials of presiding Judges Carol Red Cherries re: ARCO/SCT agreement injunction August/September 1980. Northern Cheyenne Tribal Court presiding Judge Mark Elk Shoulder Northern Cheyenne Tribal Court.

[10] See Santa Clark Pueblo v. Martinez—U.S. Supreme Court re: Custom law and review history of Northern Cheyenne Tribal Court for specific rulings under custom law as proffered in Petition of Northern Cheyenne Tribe v. Redneck, et al—1981—Northern Cheyenne Tribal Court.

[11] Review Northern Cheyenne Tribal Constitution in respect to difference to provisions of the Constitution of the United States.

[12] See official Tribal files—office of the Tribal Chairman—Northern Cheyenne Tribe—1973 or official files—United States Geological Survey—Billings, Mont. 1973.

[13] See USGS evaluation of Oil and Gas lease bid offering circa 1973 and 1974—office of Superintendent—BIA—Northern Cheyenne Agency; USGS files Billings, Mont. or Casper, Wyo.; office of the Tribal President—Northern Cheyenne Tribe.

[14] See files of BIA area offices—Billings, Mont. Contracts and Services.

[15] Interview Tom Wilson employed by Department of Interior—BIA in 1978.

[16] See Report of Raytheon Inc., Billings area office or Northern Cheyenne Agency files circa 1973 re: Infra-red and high-resolution photographic surface feature interpretations—Possibly at Forestry or Land Operations.

[17] Note date first USGS topographical map of Northern Cheyenne Reservation and vicinity ref SE corner Painted Hill Quadrant and adjoining quadrants.

[18] See files of Northern Cheyenne Research Project circa 1973 or files of Tribal President Northern Cheyenne Tribe.

In other words and in more detail, as discovered by this author, why is the reservation outlined by penetration density according to a report on Powder River Basin Potential in a 1971 compilation of reports on "Petroleum Potential for the United States" published by the American Association of Petroleum Geologists [19] at a ratio which exceeds 20 to 1, particularly when it must have been obvious to the industry for years that the anomaly was the most prominent surface petroleum geologic feature in the north Powder River Basin.

Carl Tokohper, a geo-physicist of Comanche ancestry [20] was retained to do the data collection and interpretations. His preliminary report to the tribe prior to Arco's first offer has been critiqued by USGS as lacking data base and inconclusive. Nonetheless, independent analysis has found it to be highly revealing. Mr. Tokohper has indicated that a more substantial report exists as his final offering. Mr. Tokohper further states that although he received $15,000 to begin work and directed the expenditure of another $65,000, he has no idea what happened to the remaining $120,000 of the grant. No satisfactory answer has been given to the tribal membership as to what happened to this $120,000. Is this the reason why Mr. Tokohper's work has been downplayed? No information purchased with taxpayers dollars is that proprietory.

Whether deliberate or not, the Northern Cheyenne Tribe has consistently been set-up by the U.S. government to allow for exploitation for the benefit of the energy industry under the guise of a national energy emergency for the same reason it was exploited of its land, then its buffalo, then its gold in the Black Hills, then its life-style, then its incredible energy potential and perhaps even, in the final analysis, its integrity despite Mr. Tokohpher's report and recommendations, veracity and credibility.[21]

Despite Mr. Tokohper's report and recommendations the fact that the most competent legal counsel available to the tribe let it be known that he felt the agreement was not in the best interests of the tribe.[22]

Despite the fact that the Congress of Energy Resource Tribe (CERT) recommended against the agreement.[23]

Despite the fact that restricting exploration and development activity to the domal arta would have done the least possible environmental damage to the reservation [24] from the standpoint of air and water quality, bearing in mind that the on-going seismic activity is projected to add 3,000 more nitrate exploded holes to the on-going damage of a previous 5,000 coal core-holes—

Despite the fact that the 1938 Minerals Leasing Act precluded such an agreement—the deal was approved by the Secretary of Interior upon review. Why? Why indeed "grandfather" such highly questionable action?

Why, indeed, provide a carte blanche piece of infringing legislation with no provisions for tribal government improvement via constitutional revision to allow for due process through a separation of powers for proper, unbiased judicial review; no provisions for comprehensive planning; no provisions for full disclosure of information to the tribal membership prior to decision-making; no provisions for referendum processes to be established in allowing the entire tribal membership to decide by ballot (after full-disclosure has been certified) on major natural resource decisions before they are concluded?

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[19] As cited.

[20] Interview Carl Tokohper—8162 Aves Way, Arvado, Colorado for final report and reconciliation of expenditures and retainer with final project audit as well as professional review of his findings.

See USGS—Casper; BIA Area—Billings or office of Tribal President Northern Cheyenne for preliminary report of Carl Tokohper and reconciliation of expenditures of $200,000 BIA grant to Northern Cheyenne Tribe for oil and gas data collection and interpretations.

See letter from Carol Tokohper to Tribal Chairman, Northern Cheyenne Tribe, Jan. 15, 1980 in file at office of Tribal Chairman outlining scope of work hours expended and request for payment for services.

[21] See record of Northern Cheyenne Coal Permit and lease situation years 1968 to 1981. Department of Interior, BIA—Commissioners office; Billings Area office, Northern Cheyenne Agency Office. Northern Cheyenne Tribal Building, Office of the Tribal Chairman.

[22] See records of Northern Cheyenne Tribal Planning Committee re: request to attorney Steve Chestnut for review of NCT/ARCO Contract—Interview former tribal councilmen Ted Risingsun and Joe Bear re: conversation with Steve Chestnut directly after report of contract review to Northern Cheyenne Tribal Planning Committee circa January to June 1980.

[23] See letter from Tom Tulk—Congress of Energy Resource Tribes—Englewood, Colorado to Tribal Chairman Northern Cheyenne Tribe dated May 2, 1980 re: computer comparison Blackfeet offer and Arco offer to Northern Cheyenne Tribe. Letter. computer comparisons, table of abbreviations and graph chart and explanation of determinents and categories.

[24] See Environmental Assessment—Northern Cheyenne/Atlantic Richfield oil and gas agreement July or August 1980—BIA area office, Billings Montana or office of Commissioners of Indian Affairs—Washington, D.C.

These are just a few guarantees which should be inserted into the Bill in addition to deletion of Section three. Before such a plum is placed before income-desperate tribal politicians, appropriations to cover these prerequisites should also be included or once again the United States of America will stand to be accused before the world of further exploiting its Native American population.

Ask the 600 off-reservation voters if they ever saw a copy of the Arco/Northern Cheyenne agreement. Ask the 300 on-reservation people who voted for the contract if they ever read the agreement.

Then, finally, of those who say they have read it, ask how many point by point can tell you the essence of each. My estimate is that no tribal member including those who negotiated the agreement can give you any good reason as to why it was voted for other than that $1500.00 was somehow magically to be given to them and that each $1500.00 would produce a vote for politicians.

Using geo-photo, gravity station mapping and drilling logs, as well as other criteria, Carl Tokohper has concluded that the structural anomaly does exist. A well called Davis No. 1 or No. 2 on the extreme south flank of the domal area as reported by tribal members working as roustabouts did produce a significant show which was analyzed before the well was plugged and abandoned. The Raytheon geologist states that equidistant bare spots trending NW/SE across the south half of the dome resembles those left behind after a shot line has been run. No one has ever been permitted to do so. Was this actually done? It has been reported that Gary Oil has done some exploratory work to the east of the domal area on the Jones Ranch—non-Indian fee land.

If this activity holds true from the past, surely the interest displayed in addition to the Takohper analysis should be eenough to far and away conclude that the prospect merited more tribal attention than it received.

Mr. Tokopher, in his preliminary report, makes the strongest of recommendations for self-development and offers hypothetical scenarious to do so. In his final correspondence with Allen Rowland, Tribal Chairman, he itemizes the scope of work and the hours spent on this work and asks for payment of $134,000.00 in ⅓ payments if necessary over a three year period.

Mr. Tokohper has consistently and over a period of 15 months maintained that he had a final report which he would not give to the tribe until he was paid, implying that this final report is even more revealing.

However, his "preliminary" report shows that the "sands" in potential producing horizens volumetrically indicate that over 12,000 acres, a 200 million barrel potential exists in the domal area alone. Allowing margin for error, even a 100 million barrel potential is well worth the gamble when one realizes the other alternatives for the tribe.

At a net $20 per barrel, this translates into 2 billion dollars for 100 million barrels. All that was required to explore that potential was $200,000 for seismological shots and work-ups and $500,000 to drill.

This potential was traded for six million in up front monies (which is not allowed in foreign trade negotiations) and another potential 4–5 million in rental income. Between 10 and 11 million dollars in total plus a comparatively amount of employment.

The relinquishment of taxation alone to Arco which has now been made concrete by the Jiccarilla decision of the Supreme Court plus the Indian Windfall tax exemption could cost the tribe any where from $60 million at 3 percent up to and beyond $500 million at 25 percent, bearing in mind that the total of state severance added to county taxes in Montana fluctuates from county to county ranging as of 1977 from a low of 3 percent to a high of 20 percent. It would not be too realistic for the tribe to tax any more than 25 of percent of the gross income.

One must also bear in mind that Arco is under no great obligation to immediately produce oil, only to explore for it. A 10 year period for exploration is provided for with no marketing expediencies guaranteed. This is over and above the 33 year span allowed for production. It could be 23 years before Arco has to produce from the date of Secretarial approval. Oil glut, transportation, regulation, price, lack of refining capacity, and lack of market could all be cited and by the magic formulas known only to the energy industry be made to sound reasonable when BIA/USGS are made to enforce the tongue-in-cheek "due diligence" factors.

The Environmental Assessment produced in less than two months time is in itself a classic understatement of the end result for the tribe when one looks at the "Force Majeur" clause of the contract which could extend the 33 production plus 10 year exploration limits indefinitely due to regulatory hang-ups alone.

As a matter of fact, the tribe could wind up owing Arco money on storage cost under certain production and marketing scenarios or be forced to accept an extremely low dollar return on its 25 percent of production.

Who negotiated for the tribe? What are their qualifications in comparison to the expertise which was rejected by the leadership? What led the tribal officials responsible for this travesty to assume the deal was appropriate? Who wrote the contract and finally why did the Secretary of the Interior fly in the face of established legislation, regulation and opinion to approve of this tragic giveaway?

Will SB 1894 answer these questions or under Section three merely brush them under the rug together with the bones from previous incessant federal boondoggles as the time historians will write about that was the "Era of Corporate Control of Indian Affairs" like unto the 1850's Department of War domination; the 1880's Church domination; the more benevolent "War on Poverty" domination"; 1930's IRA/BIA domination; and the Self-determination and Education Act domination wherein tribal leaders were deliberately taught the gentle art of manipulation and cover-up, if not misappropriation and in some instances out-right theft.

In the face of this type of an history, the simplistic language of SB 1894 is nothing short of total absurdity.

Senator MELCHER. Joe.

Mr. BEAR. Mr. Chairman, my name is Joe Bear. I am a member of the Northern Cheyenne Tribe. I am here on the request of our members. First, I wish to explain that there is a division among our people concerning the Arco agreement with the Northern Cheyenne Tribes.

Our Montana Senator, Mr. John Melcher, introduced Senate bill 1894 that will permit Indian tribes greater flexibility in the development of mineral resources.

We have a question on the bill where it states:

. . . (other than a lease approved pursuant to the act of May 11, 1938), or other agreement approved by the Secretary of the Interior (hereinafter referred to as the "Secretary") for the disposition of oil and gas, geothermal, or other mineral resources of tribal lands . . .

Sec. 3. Agreements of the type described in the first section of this act for the development of production of oil and gas or other mineral resources of tribal lands approved by the Secretary prior to the date of enactment of this act are hereby ratified as of the date of such approval.

In summary, we do not want the Northern Cheyenne Tribe and Arco agreement ratified.

Thank you, Mr. Chairman.

Senator MELCHER. Bill, was the other testimony you wanted submitted that of Clayton Small?

Mr. PARKER. No. It was that of myself, Senator.

Senator MELCHER. Mr. Charles Whitedirt will address the committee in Cheyenne, interpreted by Mr. Wayne Little Whiteman.

[Charles Whitedirt speaking in Cheyenne, interpreted by Wayne Little Whiteman.]

Mr. LITTLE WHITEMAN. My name is Wayne Little Whiteman; I am also a member, position of the Elkhorn Society. I also act as interpreter for Mr. Charles Whitedirt who just submitted and verified his testimony on behalf of his position as the headsman of the Elkhorn Society of Northern Cheyenne Military Warriors.

In behalf of Mr. Whitedirt's testimony, he stated:

Mr. WHITEDIRT. He is here for clear understanding for himself, for his people, for his family, for his home and addressed in the matter to this governing body, the BIA, to the Congress of the United States. He is here telling the people about the things that have been going on,

on the Cheyenne Reservation, such as the action, the resolutions, and the motions that have been taking place on the tribal council.

For this he is saying he wishes to know what is really going on because he states in his testimony that he still lives on his land with his family, and he regards that as home; he lives there. He states that he is 75 years old, has a lot of grandchildren and his folks live there, his grandparents lived there, and he is still there today.

He wants an understanding that he will be there until he departs from this Earth with an understanding that he will be heard today and addressing in behalf of Mr. Melcher and in behalf of the Senate bill 1894. Further stating that the tribal council is aware of these things, but they fail to bring up these issues to the people in regards to the district meetings, the general meetings. This is why we have misunderstanding; why there is no communication. This is what he is telling you today.

Also, he stated that his life has been threatened because he speaks out on these issues, and for him at this age and his initiative to say that on these issues he wants to know why these things have to be taking place, when a life-threatening things would have to be brought about against an elder person on a Cheyenne Reservation?

He says there is no need to say that—this is not the thing because he is looking at the area government as a white man's tool, as the white man's system which he does not fully understand. But the traditional law, the traditional society is something he understand very clearly because as a headsman he has the rights to address these, and standing up to any group governing body addressing the matter as for the welfare of his people and defender of his people.

So, what he is saying to you is that much is needed to be addressed in the matter of communication for the misunderstanding and also communication wide. So, he is saying that this bill should be looked upon more closely especially this one section 3, and it should not be passed.

He is saying that there should be other matters relating to this section 3 that would really address to the Cheyenne people.

Mr. LITTLE WHITEMAN. With that, we conclude our testimony.

I also have a letter of support that we are in touch with the traditional government from the Black Hills Sioux Nation Council. With this letter of support, we would like to leave that with you as it touches base on the traditional government. We would like to read this on behalf of our presentation here, and it states:

Hon. JOHN MELCHER,
Select Committee on Indian Affairs,
Washington, D.C.
Re. Senate Bill 1894, Section 3.

DEAR MR. MELCHER: The Black Hills Sioux National Council hereby supports the Northern Cheyenne Traditional Government in its recommendation to repeal or omit Section 3 of Senate Bill 1894.

We see many detrimental developmental procedures if this section 3 were to remain in the Act. We also would like to have the agreements approved by the Secretary prior to the passing of this bill nullified, and renegotiated after the after the bill becomes law.

Otherwise, we see a segment of the 1938 Mineral Leasing Act which prohibited Indian Tribes from negotiating with companies or corporations for joint ventures, profit-taking or service contracts remaining in Senate Bill 1894.

Very respectfully yours,

OLIVER RED CLOUD,
Chairman, Black Hills Sioux Nation Council.

Mr. LITTLE WHITEMAN. With this, we would like to conclude our testimony because we are in a good working relationship with our traditional allies, with our brothers and sisters of the Arapaho Nation, of the Sioux Nation, because it is a crucial time for the Indian population-wise will have to speak out on these issues as one group, maybe as two groups, maybe as three groups. In this instance, it is the three nations for the simple reason to try to strengthen the tribal government.

All we are asking is to be heard from here, from this office, from the U.S. Congress, and also we are looking up to you and saying, the highest law of the land, why is it you have to do these things.

This is nothing new to the Cheyenne people. In years past, looking at 150 years, Cheyenne has been under the gun. Now, we are under the words of the BIA; we are under the U.S. Congress, and it is about time that we sit down together and try to talk as one group because we look up to you. Like Mr. Whitedirt just stated: "Have pity on an elder man." I speak for my people. I speak as a headman I speak as a Cheyenne Indian today.

I thank you.

Senator MELCHER. Thank you. Bill, did you vote in the two referendums described?

Mr. PARKER. Yes, Senator.

Senator MELCHER. Joe, did you vote in the two referendums?

Mr. BEAR. No.

Senator MELCHER. You did not. Were you vice chairman at the time?

Mr. BEAR. Yes.

Senator MELCHER. You did not vote?

Mr. BEAR. No.

Senator MELCHER. Could you explain why?

Mr. BEAR. There were some points in the agreement, and I was not wholly in support with parts of that ARCO Agreement. I am just 1 out of 24, and it is pretty hard to convince 24 when there is such a big issue at the time—at the time that we were in the process of—there was a reelection coming along.

Senator MELCHER. Might I interrupt, Joe. Were you talking about voting on the council or voting on the referendum?

Mr. BEAR. I did not vote in the referendum.

Senator MELCHER. You did not vote in either referendum?

Mr. BEAR. Right.

Senator MELCHER. Out of disagreement with the referendum?

Mr. BEAR. I felt that the vote of confidence was to find out what the true feelings were of the people at the time.

It should have been the other way around. The referendum should have been out before the vote of confidence, and that is just my personal feeling.

Senator MELCHER. The vote of confidence, you thought the people themselves ought to express their attitudes, their feelings on the tribal council's recommendation?

Mr. BEAR. Right. The council knew what the people were feeling.

Senator MELCHER. In the September 15 referendum, you did not vote either because you felt that it should have been held before the vote of confidence?

Mr. BEAR. Right.
Senator MELCHER. Wayne, did you vote?
Mr. LITTLE WHITEMAN. Yes, I voted.
Senator MELCHER. In both referendums?
Mr. LITTLE WHITEMAN. I voted the referendums.
Senator MELCHER. Would you ask Charles if he voted?
Mr. LITTLE WHITEMAN. Yes, he voted.
Senator MELCHER. In both of them.
Mr. LITTLE WHITEMAN. Yes.
Senator MELCHER. Thank you all very much.
Larry, you now wanted to express your thoughts.

STATEMENT OF LARRY KINDNESS, MEMBER, CROW TRIBE

Mr. KINDNESS. Mr. Chairman, my name is Larry Kindness; I am an enrolled member of the Crow Nation and an elected member of the executive committee of the Crow Tribal Council.

The testimony I am giving today is as an individual Crow Tribal member. The reason I am testifying as an individual member of my tribe is that this most important legislative matter has never been presented to the Crow Tribe either at public hearing or at a duly called council meeting. Therefore, my people know little or nothing about Senate bill 1894.

Testimony given on February 13, 1982, in Billings, to the effect that the Crow Nation endorses Senate bill 1894 in its original form was completely out of line as these people did not have the authority delegated to them by the Crow Tribal Council.

So, in essence, their testimony was given as individual members rather than elected delegates representing the Crow Nation.

After reviewing Senate bill 1894, I feel that the Crow Tribe should come out officially against the bill that you, Senator Melcher, are advocating. My tribe, the Crow Indians, have disputed coal contracts with different energy companies as follows: Gulf has 80,000 acres; Peabody some 70,000 acres, and Shell has the exclusive rights to 30,000 acres. All this acreage is within the exterior boundaries of the Crow Indian Reservation, with Shell the closest to having a lawful contract.

Now, the following is an analysis of the Shell-Crow Tribe joint venture, and I would just like to run through this briefly. Many companies in dealing with Indian tribes use tempting bribes to attract the attention of the tribes, but which usually are merely hollow promises. Examples of these bribes are joint ventures, profit sharing, et cetera.

The prospect of additional economic return and control to the tribes, but are designed to be meaningless and offer no real advantage to the tribe. In the Crow-Shell lease agreement, both joint venture and profit sharing are proposed. The joint venture is authorized by the leasing section 4.02.03 at the tribe's option.

The tribe can only exercise this choice if the company takes its option on the Tanner Creek area. The tribe will also have to foot its share of the operating costs to be considered a joint venture partner. This could be substantial and beyond the tribe's ability to pay. Credit could be levied against the tribe's royalty interest. The tribe has no way of realizing, under the present lease, the full implications of exercising its alternative to joint venture at Tanner Creek area.

It remains to be seen if the tribe will be able to exercise its option until the full ramifications of such an action are determined. The profit sharing program, as outlined in exhibit B of the sale agreement of the lease, will never yield $1 of profit to the Crow Tribe. The plan calls for the annual cash flows to be discounted at a 22-percent discount rate. A profit, sir, will only occur when the cumulative discounted cash flow exceeds zero. This would only happen if the rate of return on investment in the mine exceeded 22 percent.

This is not likely since the average rate of return for coal mining ventures is only 8 percent. The analysis biases the estimated costs and revenues so that every conceivable opportunity is given the project to yield a profit share. The costs were estimated conservatively low and revenues were estimated high. Despite this bias, the project fails to achieve a positive cumulative discounted cash flow and no profit share is awarded.

So, not knowing to what extent Senate bill 1894 will affect our tribes as sovereign nations and as individual members of Indian tribes, the individuals from my tribe who were in agreement of this bill on February 13, 1982, in its original form, are not fully aware of the self-government and constitutional problems that could arise upon passage of this bill. And until the time comes that all Indian nations across the country can grasp the full meaning of the joint ventures, joint production agreements, risk service agreements, managerial agreements, and so on, and so forth, and certain safeguards for mineral rich Indian nations be structured into this bill, it should be set-aside until all tribes have at least read and understood its full contents since this bill was supposedly designed for the best interest of all Indian nations.

Thank you.

Senator MELCHER. Well, we are attempting, Larry, to deal with this problem in a manner that is satisfactory to tribes. In February, Mr. Hogan spoke, we thought, for the tribe.

Mr. KINDNESS. Mr. Melcher, he was not delegated the authority from the Crow Tribal Council to do so. Furthermore, we have never had a hearing or a council meeting pertaining to this matter.

Senator MELCHER. Well, the tribal council of the Crow Tribe is every member of the tribe.

Mr. KINDNESS. Every member of the tribe.

Senator MELCHER. Above the age of 18 or older for women?

Mr. KINDNESS. Right.

Senator MELCHER. And 19, or is it 21 or older, for men?

Mr. KINDNESS. It is 18 for ladies and 21 for men.

Senator MELCHER. So, what you are telling us is that in the quarterly meetings of the tribe this matter has not been discussed?

Mr. KINDNESS. It has not been discussed and, according to our constitution, any legislative matter coming before the administrative branch of the tribe should be presented to the tribal council in a duly called meeting.

Senator MELCHER. Well, the bill was introduced last year and I assume you have had a tribal council meeting since then?

Mr. KINDNESS. We have, but we have not had any discussion on this bill, and it was just brought to my attention on February 13, the day of your hearing in Billings. That is how much in the dark we are kept.

Senator MELCHER. Now, here is the testimony of Mr. Hogan. I do not know if you were present there or not.

Mr. KINDNESS. I was present at the time, but I could not hear.

Senator MELCHER. I will read you his testimony:

In closing, Senator, we are in a position now where we are aware, as Mr. Blackhart said from Shell Oil, we have a lot of friends and people, and all the people who are aware know the value of our mineral assets and we would like to somewhat control our own management and our own production. Another thing with these big conglomerates, big oil energy companies, and so forth, one of their major interests is to come out and tie up your mineral assets for a long period of time. This would give us some flexibility to develop our own proposals and deal with these people more for the benefit of the 6,500 members we have in our tribe.

Where he is referring to this, I believe, he meant the bill itself. So, this committee is not trying in any way to tell the tribe what to do. The committee is seeking to allow the tribe the flexibility that most Indian tribes have been asking for the past 2 or 3 years, and maybe longer.

Mr. KINDNESS. Pursuant to the act of 1938, we already have this authority, the Crow Tribe does. I think maybe the tribes—my idea is for the tribe to do its own development of our own natural resources of which we have much.

Senator MELCHER. I would like to complete that sentence. The committee does not seek to tell the tribe what to do. For the past several years we have been asked by tribes to provide, under law, a more flexible arrangement for development of tribal resources under Indian self-determination, and the bill is merely a proposal to provide that opportunity but in no way seeks to tell the tribes what their best judgment should be. We are not trying to impose that on the Crow Nation, or any of the rest of the Indian tribes. We are seeking to provide more flexibility for the tribes to use their options as they best see fit.

Now, if there is a feeling among the Crow people that the matter has not been fully discussed by the tribe, I would hope that at the next tribal council meeting it is discussed.

Mr. KINDNESS. It is the responsibility of the secretary of our tribe, Mr. Hogan, to bring these things to the council, either in a public hearing or at a special called tribal meeting. Any legislative matter concerning our tribe should be discussed by the whole Crow Tribal Council, but nothing has been done yet.

Senator MELCHER. I would hope you could perhaps get it on your agenda at the next meeting.

Mr. KINDNESS. Hopefully.

Senator MELCHER. Thank you very much, Larry.

Chris Farrand, vice president, Peabody Coal Co.

STATEMENT OF CHRIS FARRAND, VICE PRESIDENT, PEABODY COAL CO., WASHINGTON, D.C.

Mr. FARRAND. Good morning, Mr. Chairman. My name is Chris Farrand, I am vice president, as you said, of Peabody Coal Co. We are pleased to be able to submit testimony today. With your indulgence, I will abbreviate my remarks and make them as short as possible.

Peabody operates two mines on Indian land on the Navajo and the joint use area of the Navajo and Hopi tribes, and we have reserve positions, or have had reserve positions on both the Northern Cheyenne and the Crow Reservation.

We employ today about 700 tribal members from the Navajo and Hopi tribes, as well as other tribal members at our Big Sky Mine in Montana.

Mr. Chairman, less than 2 years ago we approached this committee to seek the committee's assistance in resolving a dispute between ourselves, several other energy companies and the Northern Cheyenne Tribe. I will not belabor the committee today about how that evolved, but simply to say that we were able to resolve our differences, again, with the aid of the committee and some special legislation. We were able to understand each other and to avoid lengthy confrontation in the courts. The lesson of that experience is that stable development of Indian energy resources cannot occur in an atmosphere in which the tribe, as the landholder, and the energy producer, who is the risktaker, view each other solely as adversaries.

The legislation we are here to discuss today, we believe, would expand the means by which tribes and energy companies can work together in nonconfrontational ways, and, as such, we endorse the legislation. While we seek some modifications to the legislation which I will discuss in a moment, we generally support the legislation for three principal reasons.

First, we believe that it provides the risk-takers, the energy concerns, with more flexibility in dealing with the tribes. In mirror image, we believe that the tribes are provided with much more flexibility to make arrangements more beneficial in economic terms to themselves. As such, it would provide an inducement to tribes to make their energy resources, and other mineral resources available to the Nation as a whole in a manner which benefits them.

Obviously, the conventional lease arrangement will no longer suffice in all circumstances.

Finaly, we believe that the evolution of different types of agreements will tend to reduce conflicts between tribes and developing interests.

Mr. Chairman, we seek your consideration of two amendments to this legislation.

Lessees under the current statute have faced the potential difficulty of enforcing the terms of their leases with Indian tribes primarily because there is a large question about judicial review of such lease arrangements. I am not talking, as witnesses were earlier, about review of the Secretary's approval of leases or agreements; I am now talking about questions of performance between the lessor, as the tribe, and the lessee, or, in this case, of parties to a joint venture agreement or other participatory agreement.

We think that the attractiveness of such arrangements would be greatly enhanced if the legislation spoke to the question of judicial review.

Now, I am told that I am skating on thin ice over murky legal waters about exactly how that is crafted, but we have developed some

language, some alternative language for the committee to consider which I will submit with your permission.

Senator MELCHER. They will be included in the record following your oral testimony.

Mr. FARRAND. Very briefly, what we propose is an arrangement in which the legislation would require that in such joint participatory agreements there be an arbitration and that the arbitration is then reviewable in Federal district court.

The second amendment we seek has to do with the potential conflict of interest that may be particular to the coal industry itself. Under section 710 of the Surface Mine Control and Reclamation Act, the Secretary is required to make a study about the role of Indian tribes in regulating surface mine activities on Indian lands. While that study has not yet resulted in the granting of specific authority to any tribes or even generic authority to allow the Secretary to grant such status to tribes, we consider it more or less a preordained circumstance. Eventually some tribes will seek, and some tribes may be granted, full regulatory authority to regulate surface mine and surface mine reclamation activities within their boundaries.

Our concern is that where a tribe is also a joint venture partner, or has an operating position, or other equity positions in a mine, they would be in conflict of interest if that tribe also had the full regulatory authority to govern the mining and reclamation activities themselves. We would suggest only very simple language that would permit the tribes to choose one role or another, but not both.

That concludes my testimony. I would be happy to answer any questions you may have.

Senator MELCHER. While we have no legislation that would permit a tribe to run their own reclamation program on their own land, I agree with you that at some point in time there probably will be such legislation. It is, at least, expected. There could be agreements entered into by a tribe concerning a joint venture in mining their own coal.

Who would be the regulator then, in that case, if tribes were later given the option to regulate reclamation?

Mr. FARRAND. As in the case today, the Federal Government will have a responsibility to regulate mining activities on Indian lands. Our mines on the Navajo and Hopi lands in Arizona are regulated by the U.S. Geological Survey acting in behalf of the tribe and the Secretary and also the Office of Surface Mining.

Senator MELCHER. Do we not have the same parallel though where a State which owns coal also does its own regulation under the terms of the Strip Mine Act?

Mr. FARRAND. Well, the State, however, does not participate in the mining venture itself. It is not an equity holder. The State is a lessor, and would not be the lessee, and I guess we differentiate between those types of arrangements where the regulator does not have an equity position in the operation itself. The State would not have to be concerned about the bottom line, the profit involved. They are only concerned about the royalty to be paid, which is automatic. That, arguably, is a different position than if the regulator also has to be concerned about the profit from the venture, and it might be an inducement to him to

make regulatory decisions to alter one way or another that profit. I think that would be a clear conflict of interest, or a potential conflict of interest.

Senator MELCHER. Does anything prohibit a State from entering into a joint venture on its own coal?

Mr. FARRAND. I would have to peruse individual States leasing laws. I know in the Federal arrangement, the Federal Government does not enter into—does not take an equity position in coal leasing on the mining activities pertaining to its coal leases. It is simply a royalty holder, and the States that I am familiar with are also simply royalty holders. They do not have the authority to enter in as an equity partner. To be candid, that is only from my experience. There may be States that do, in fact, have that authority.

Senator MELCHER. Well, you are flagging a possible conflict. I appreciate your doing that for us. It is something that we should be considering. You do hold some preference rights on the Crow Reservation; is that correct?

Mr. FARRAND. That is correct.

Senator MELCHER. But you have no joint agreement, or no joint venture?

Mr. FARRAND. We have no joint agreement, and those preference right lease applications have been in litigation for sometime.

Senator MELCHER. Thank you very much, Chris.

Mr. FARRAND. Thank you.

[The proposed judicial review amendments and prepared statement of Chris Farrand follow:]

PROPOSED JUDICIAL REVIEW AMENDMENT NO. 1

Any agreement entered into under the authority conferred by section 1 of this Act, and any lease hereafter approved pursuant to the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. §§ 396a et seq.), shall provide that any dispute or controversy arising out of such agreement or lease shall be settled by arbitration under rules and regulations promulgated by the Secretary, and that the decision or award rendered by the arbitrators in accordance with such rules and regulations shall be conclusive and binding on all parties to the agreement or lease. Any party to the agreement or lease may commence a civil action to compel any other party to submit such dispute or controversy to arbitration or to enforce the decision or award of the arbitrators. The United States District Court of the judicial district in which the lands which are the subject of the agreement or lease are located shall have exclusive jurisdiction of any such civil action, without regard to the amount in controversy. Neither an Indian tribe nor the United States, nor their respective officers, agents, employees or members may assert a tribe's sovereign immunity as a defense against either the initiation of arbitration proceedings under the agreement or lease, or the institution of a civil action in district court to compel arbitration or to enforce a decision or award of the arbitrators.

PROPOSED JUDICIAL REVIEW AMENDMENT NO. 2

Any party to an agreement entered into under the authority conferred by section 1 of this Act, and any party to a lease hereafter approved pursuant to the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. §§ 396a et seq.), may commence a civil action to enforce its terms and conditions and the rights created thereunder. The United States District Court of the judicial district in which the lands which are the subject of such agreement or lease are located shall have exclusive jurisdiction of any such civil action, without regard to the amount in controversy. Neither an Indian tribe nor the United States, nor their respective officers, agents, employees or members may assert a tribe's sovereign immunity as a defense against the commencement of any civil action authorized hereunder.

PROPOSED AMENDMENT No. 3

Insert after line 2, page 3, and re-number subsequent sections:

"Section 5. No Indian tribe which has entered into a joint venture agreement, joint operating agreement, joint production agreement, risk services agreement, or other equity participation agreement under this Act for the purpose of mining coal may be granted full regulatory authority to regulate surface mining and reclamation activities instituted pursuant to such agreements."

PREPARED STATEMENT OF CHRIS FARRAND, VICE PRESIDENT, GOVERNMENT RELATIONS, PEABODY COAL COMPANY

Mr. Chairman, Members of the Select Committee, my name is Chris Farrand; I am Vice President of Peabody Coal Company, which is the Nation's largest producer of steam coal.

We are pleased to be able to appear before the Committee today to provide testimony on S. 1894, legislation designed to provide flexibility in the means by which Indian tribes can go about developing their energy resources. Peabody has had extensive experience in the development of coal from Indian lands. We currently operate two coal mines on the Navajo Reservation and the Navajo-Hopi Joint Use Area in Arizona, and we have or have had reserve positions on both the Crow and Northern Cheyenne Reservations in Montana. On an energy unit basis, Peabody is the largest single producer of energy resources from Indian lands. Our operations in Arizona currently employ approximately 700 members of the Navajo and Hopi Tribes, and we employ other tribal members at our Big Sky mine in Montana.

Mr. Chairman, less than 2 years ago, we appeared before this Select Committee seeking legislation authorizing special agreements between the Northern Cheyenne Tribe, the Secretary of the Interior, and certain affected energy companies holding coal leases and permits on the tribe's lands. These agreements, in essence would legally abrogate those permits and leases. The special legislation was necessitated by an impasse which developed between the companies involved and the Northern Cheyenne Tribe. The tribe felt that, in a cumulative sense, too much of its land had been leased and that the tribe had little authority over the development of their coal reserves. Through special legislation prepared by this Committee, the impasse was resolved in what I think the parties agree was an equitable manner. We were able to come to an understanding of each other's position and, with the aid of this Committee, seek a solution which avoided confrontation in the courts. The lesson of that experience is that the stable development of Indian energy resources cannot occur in an atmosphere in which the tribe, as landholder, and the energy producer, who is the risk-taker, view each other as adversaries.

The legislation now before this Committee will, if enacted, expand the means by which tribes and energy developers can work together in cooperative, non-confrontational ways. As such, Peabody endorses the proposed legislation, but would suggest modifications which would make joint ventures and other agreements between tribal entities and risk-taking energy producers even more attractive.

S. 1894 would provide specific authority for joint venture agreements and other participatory arrangements between Indian tribal governments and private energy concerns for the purpose of developing oil, gas, coal, geothermal and other tribally-owned mineral resources. This legislation is required in order to overcome the prohibition of the Indian Non-Intercourse Act, which outlaws conveyance to non-Indians of interests in Indian land except through coventional lease arrangements which were specifically authorized by Congress under the omnibus Indian Mineral Leasing Act of 1938. S. 1894 would permit Indian tribes to enter into agreements in which the tribes themselves assume an equity position and actively participate in the development venture, rather than take a passive role as the royalty-holder. Such joint venture agreements, joint operating agreements, joint production agreements, or other participatory agreements must still be approved by the Secretary of the Interior, acting in his role as trustee for the Indian tribes.

Peabody believes that the availability of such participatory agreements will not only benefit energy resource tribes, but will provide interested energy concerns with more flexibility in their negotiations with Indian tribal governments. We recognize that the traditional mineral lease relationship which has characterized energy development on Indian lands will no longer suffice in all circum-

stances. The ability to offer tribes a degree of equity participation in the extractive ventures provides an added inducement for the tribes to make their resources available.

We, therefore, urge the Committee to act favorably on S. 1894. We also ask the Committee to consider two possible amendments which would enhance considerably the attractiveness of such joint participatory agreements from the viewpoint of the private sector.

Under current law, non-Indian lessees face potential difficulties in enforcing the terms of their leases with Indian tribes, since judicial review of transactions on Indian reservations is confined to tribal courts. The perception exists that non-Indian parties are disadvantaged in such courts because the separation of powers between the tribal governments as lessors and tribal courts is not as pronounced as it is under our federal system. We, therefore, urge consideration of an amendment to S. 1894 which would provide for judicial review in federal district courts for questions arising from leases, joint ventures or other joint participatory agreements authorized under the bill. In the absence of such a judicial review provision, there is the potential for unequal enforcement of the terms of such agreements. First, the tribe could declare sovereign immunity; and second, there would be the impression that the tribal courts might not exercise total impartiality in their review of disputes arising under such agreements.

Under provisions establishing an arbitration mechanism with ultimate judicial review in Federal court, the tribes and the private parties would not only share equal access, but the tribes would continue to enjoy the assistance of the Federal Government under the Government's trust responsibility. Moreover, the perception would exist that the court would exercise complete impartiality in any dispute. The addition of such a provision would make joint ventures and other participatory agreements more attractive to the private sector than they would be under current judicial circumstances. We urge that the Committee adopt such an amendment.

Peabody also suggests a second amendment which would avoid a potential conflict of interest in situations where a tribe is an equity position holder in a coal mining venture and also the designated regulatory authority under the Surface Mining Control and Reclamation Act (SMCRA). We suggest that where a tribe is an operator or has an equity position in a coal mine, it would be inappropriate for the tribe to also be the regulating authority for coal mining and reclamation activity in such ventures. Our suggested amendment would prohibit the granting of full regulatory authority to individual Indian tribes under Title VII of SMCRA if such tribes elect to participate in equity agreements.

We would be happy to furnish the Select Committee with draft language to amend the bill in accordance with these suggestions.

Mr. Chairman, Peabody supports the purposes of S. 1894, and we compliment Senator Melcher for his sponsorship of this legislation. With the modifications we have suggested, we believe the bill, if enacted, would greatly benefit tribes whose land is rich in energy resources and whose people need the jobs and other economic returns which such resources can generate. Moreover, by encouraging development of these resources on an equitable basis, we are increasing their availability to the Nation as a whole.

We thank you for this opportunity to provide our views.

Senator MELCHER. Our next witness is Dougald H. Thamer, president, Mission Resources, Oakland, Calif.

STATEMENT OF DOUGALD H. THAMER, PRESIDENT, MISSION RESOURCES, OAKLAND, CALIF., ACCOMPANIED BY STEVEN QUARLES, NOSSAMAN, KRUEGER & KNOX, COUNSEL TO MISSION RESOURCES

Mr. THAMER. Good afternoon, Mr. Chairman. Thank you for the opportunity of being with you.

Mr. Chairman, my name is Dougald Thamer; I am president of Mission Resources, an independent oil and gas company headquartered in Oakland, Calif. Accompanying me today is Mr. Steven Quarles of Nossaman, Krueger & Knox, counsel to Mission Resources.

In the interest of time, I have deleted four pages from my testimony. With your indulgence, I will cover the other five pages.

Attached to my testimony is a more detailed analysis of the bill, plus suggested changes to it. Also attached is a markup of the bill showing the changes we suggest.

We respectfully request that my full statement and these attachments be included in the record.

I am pleased to testify today in favor of S. 1894. Mission Resources, for the past several months, has been involved in the negotiation of an operating agreement soon to be submitted to the Department of Interior regarding the development of Navajo Nation oil and gas.

Although S. 1894 is of immediate concern to my company because of this operating agreement, I believe the experience we have gained during the negotiation is relevant to others in their effort to develop Indian natural resources.

Accordingly, some of my comments go beyond Mission Resources' immediate interest in S. 1894 and focus on broader public policy concerns relating to the proposal.

Mr. Chairman, we wholeheartedly endorse the concept of S. 1894. We congratulate you for introducing the measure and the committee chairman and other members of the committee for according it prompt attention.

The proposal would increase the flexibility of Indian tribes and Indian allottees to enter into modern contractual arrangements for the development of Indian-owned minerals.

While Mission Resources strongly supports the concept of S. 1894, we propose the adoption of several amendments. These amendments would not detract from the bill's purpose, but rather would enhance the measured basic objective of Indian self-determination and would render S. 1894 a more effective measure in facilitating the negotiating process.

I will highlight only two most significant areas of concern and discuss the drafting modification we suggest in each area.

The first of these major area concerns: the respective roles of the Indian resource owner and the Interior Department in formulating and approving mineral development agreements. Basically, we believe that the current language of the bill carves out too large a regulatory role as opposed to a supervisory role for Interior and should be modified to accord more flexibility and discretion to the affected Indian resource owner. For example, under language of the current bill it appears that: No. 1, S. 1894 is not self-implementing and that the authorization of particular forms of agreements is dependent upon Interior's issuance of implementing regulations.

No. 2, Interior could constrain tribal negotiating options by restrictive rules on minimum terms and conditions. The combination of lack of self-implementing language and the authorization of regulation prescribing minimum term and condition for all types of agreements would appear to place Interior in the position of dictating agreement terms even before negotiations are initiated.

We believe that the better course, and the only course consistent with the objective of self-determination would be to allow tribes and allottees to determine desired agreement terms in the first instance. We simply do not believe that it is possible to devise minimum agreement

terms that are desirable in all situations, present and future, especially within the tight 180-day rulemaking schedule anticipated in S. 1894.

No concept of fair term of agreement can be applied across the board to all types of agreements involving diverse parties' resources and situations. For example, a short agreement life for periodic renegotiation of agreement terms at times justifiable with respect to the lease may make no sense when the tribe wishes to negotiate for itself an escalating share of profits in the joint venture.

Furthermore, even were it possible to devise a minimum term for the types of agreements being negotiated today, such terms would likely be inappropriate tomorrow as forms of agreements, and the provisions continue to evolve. This legislation is before the committee today precisely because the type of agreements and term which were fair and equitable to the Indian in 1938 when the Omnibus Indian Mineral Leasing Act was enacted are no longer so today. As written, however, S. 1894 would encourage a mere recreation through regulations writing of the restrictive regime of the 1938 act. We do not suggest that the trust responsibility of the Secretary of Interior should be diminished in any manner.

The Secretary's best interest of the tribe review set out in section 1 would not be deleted or altered. Instead, we support the position of the Ute Mountain Ute and Black Feet Tribes expressed at the Billings hearings and CERT at today's hearings. That prior to the Secretary's review, the tribes and allottees should be free to negotiate any type of mineral development agreement they desire and believe to be in their best interest without the constraint of binding regulations.

Under our suggested amendment, the Secretary's regulatory role of dictating minimum agreement terms prior to agreement negotiation process would be changed to a role of providing advisory guidelines and negotiating assistance when requested.

A second suggested amendment would make S. 1894 self-implementing so that the ability of the tribe to enter into an agreement is not dependent on having authorization—authorizing Interior regulations in place. Instead of directing the issuance of regulations to implement the act, we suggest the bill should simply authorize the issuance of regulations consistent with the act.

This should allow tribes to enter into agreements even if the Secretary's regulations are not forthcoming, are tied up in litigation, or do not expressly authorize a specific type of agreement.

Although the bill contains a 180-day requirement for issuance of regulations, we believe that the deadline may not be met, and certainly would be exceeded if those regulations must contain minimum terms and conditions for each form of agreement.

While the rulemaking deadline is a valuable indicator for congressional intent, it is virtually unenforceable if it is unmet despite the best intentions.

Without suggested amendment, S. 1894 could have a wholly unintended, undesired and unfortunate result of placing a moratorium on approval of all agreements for a potentially extended period of time.

Turning to our second major area of concern, we believe that the current bill language does not fully address issues of transition to the

expanded authority of S. 1894. These issues relate to: No. 1, the approval of innovative agreements currently pending before Interior and awaiting the enactment of S. 1894, and, No. 2, congressional ratification of those agreements already approved by Interior.

A discussion of the second issue is contained in the attachment to my testimony. With regard to the first issue concerning currently pending agreements, and in light of the fact that Interior will have already undertaken a preliminary review of each agreement by the time of S. 1894's enactment, we believe it would be inequitable to allow a 1½-year delay in the completion of the review which would be possible under S. 1894 as presently drafted. For instance, 6 months to develop implementing regulation, plus 1 year for review. Accordingly, we have suggested language to authorize, but not direct, Interior to approve or disapprove such pending agreements expeditiously prior to promulgation of the regulations.

In conclusion, Mr. Chairman, we strongly support the concept and objectives of S. 1894. We respectfully urge the committee to expeditiously consider the legislation and our proposed amendments, and to report favorably the amended bill.

I would be happy to answer any questions you have.

Thank you.

Senator MELCHER. Mr. Thamer, we are indebted to you for this testimony. We are indebted to you for the suggestions in the proposed language. We will take that under consideration very seriously.

Mr. THAMER. Well, thank you very much.

Senator MELCHER. The documents you submitted will be made a part of the record at this point.

[The documents follow. Testimony resumes on p. 121.]

PREPARED STATEMENT OF DOUGALD H. THAMER, PRESIDENT OF MISSION RESOURCES, INC., OAKLAND, CALIF.

Mr. Chairman, my name is Dougald Thamer. I am President of Mission Resources, an independent oil and gas company, headquartered in Oakland, Calif. Accompanying me today is Mr. Steven Quarles of Nossaman, Krueger & Knox, counsel to Mission Resources.

I am pleased to testify today in favor of S. 1894. Mission Resources for the past several months has been involved in the negotiation of an Operating Agreement soon to be submitted to the Department of the Interior regarding the development of Navajo Nation oil and gas. Although S. 1894 is of immediate concern to my company because of this Operating Agreement, I believe the experience we have gained during the negotiations and the understanding we have developed regarding the needs and concerns of The Navajo Nation are relevant to others in their efforts to develop Indian natural resources. Accordingly, some of my comments go beyond Mission Resources' immediate interests in S. 1894 and focus on broader public policy concerns relating to the proposal.

Mr. Chairman, we wholeheartedly endorse the concept of S. 1894. We congratulate Senator Melcher for introducing the measure and you and the other Members of this Committee for according it prompt attention. The proposal would increase the flexibility of Indian tribes and Indian allottees to enter into modern contractual arrangements for the development of Indian-owned minerals. While the existing law is unclear, its effect is substantially to limit Indian tribes to development of mineral resources through leases issued pursuant to the Omnibus Indian Mineral Leasing Act of 1938 (25 U.S.C. §§ 396a et seq.). S. 1894 would supplement the leasing authority of the 1938 Act and would provide Indian tribes and allottees with clear authority to negotiate for the development of their mineral resources through more modern and advantageous contractual arrangement of Indian lands from the perspective of both Indian tribes and their con-

While primary reliance on lease arrangements may have made sense in 1938, we believe that today it is an unjustified impediment to rational mineral development of Indian lands from the perspective of both Indian tribes and their contractors and coventurers. Lease agreements make Indian tribes and allottees passive administrators of their lands, frequently locking them into unfavorable rental and royalty payments for essentially the life of the resource in this era of increasing energy prices. Furthermore, the advertising, competitive bidding requirements and acreage limitations of the 1938 Act with respect to oil and gas leases lead to bid discounting and, in cases, to inefficient resource development.

While some tribes and allottees may wish to continue to employ the traditional lease agreement—and S. 1894 wisely preserves the 1938 Act leasing authority for those who elect to do so—other tribes and allottees clearly desire a broader, more active role in the development of their resources. S. 1894 permits this more active role by authorizing Indian use of the more innovative agreements which have become commonplace in modern resource development. These innovative agreements can be more economically attractive to the resource owner than conventional leases and can permit the tribes and allottees to formulate agreements tailored best to serve tribal economic, employment, social and environmental objectives. These agreements also permit the developers to negotiate for terms which meet their particular needs. The developers, in turn, can provide additional benefits to tribes and allottees commensurate with the promise of greater flexibility inherent in non-lease agreement negotiations. We submit that in order to make self-determination a reality, Indian resource owners should have the same mineral development prerogatives as all other resource owners. S. 1894 would be an important step in that direction.

While Mission Resources strongly supports the concept of S. 1894, we propose the adoption of several amendments. These amendments would not detract from the bill's purpose but rather would enhance the measure's basic objective of Indian self-determination and would render S. 1894 a more effective measure in facilitating the negotiation process. These suggested amendments are presented and analyzed for the record in a separate document which I have submitted as part of my testimony. In order to save the Committee's time, I will highlight only the two most significant areas of concern and discuss the drafting modifications we suggest in each area.

The first of these major areas concerns the respective roles of the Indian resource owner and the Interior Department in formulating and approving mineral development agreements. Basically, we believe that the current language of the bill carves out too large a regulatory role (as opposed to a supervisory role) for Interior, and should be modified to accord more flexibility and discretion to the affected Indian resource owner. For example, under language of the current bill it appears that: (1) S. 1894 is not self-implementing and that the authorization of particular forms of agreements is dependent upon Interior's issuance of implementing regulations; (2) Interior could constrain tribal negotiating options by restrictive rules on minimum terms and conditions; and (3) Executive Branch disapproval of agreements advanced by Indian tribes would result in the demise of the agreements.

The combination of the lack of self-implementing language and the authorization of regulations prescribing minimum terms and conditions for all types of agreements would appear to place Interior in the position of dictating agreement terms even before negotiations are initiated. We believe that the better course, and the only course consistent with the objective of self-determination, would be to allow tribes and allottees to determine desired agreement terms in the first instance. We simply do not believe that it is possible to devise minimum agreement terms that are desirable in all situations, present and future, especially within the tight 180 day rule-making schedule anticipated in S. 1894. No concept of "fair" terms of agreement can be applied across the board to all types of agreements involving diverse parties, resources and situations. For example, a short agreement life or periodic renegotiation of agreement terms, at times justifiable with respect to a lease, may make no sense where the tribe wishes to negotiate for itself an escalating share of profits in a joint venture.

Furthermore, even were it possible to devise minimum terms for the types of agreements being negotiated today, such terms would likely be inappropriate tomorrow as the forms of agreements and their provisions continue to evolve. This legislation is before the Committee today precisely because the types of agreements and terms which were fair and equitable to Indians in 1938 are no

longer so today. As written, however, S. 1894 would encourage a mere recreation through regulation-writing of the restrictive regime of the 1938 Act.

We do not suggest that the trust responsibility of the Secretary of the Interior should be diminished in any manner; the Secretary's "best interest of the tribe" review set out in section 1 would not be deleted or altered. Instead, we support the position of the Ute Mountain Ute and Blackfeet Tribes expressed at the Billings hearing that, prior to the Secretary's review, the tribes and allottees should be free to negotiate any type of mineral development agreement they desire and believe to be in their best interest without the constraint of binding regulations. Under our suggested amendment, the Secretary's regulatory role of dictating minimum agreement terms prior to the agreement negotiation process would be changed to a role of providing advisory "guidelines" and negotiating assistance, when requested.

A second suggested amendment would make S. 1894 self-implementing so that the ability of a tribe to enter into an agreement is not dependent on having authorizing Interior regulations in place. Instead of directing the issuance of regulations "to implement" the Act, we suggest the bill should simply authorize the issuance of regulations "consistent with" the Act. This would allow tribes to enter into agreements, even if the Secretary's regulations are not forthcoming, are tied up in litigation, or do not expressly authorize a specific type of agreement.

Although the bill contains a 180 day requirement for issuance of regulations, we believe that the deadline may not be met, and certainly would be exceeded if those regulations must contain minimum terms and conditions for each form of agreement. While the rulemaking deadline is a valuable indicator of Congressional intent, it is virtually unenforceable if it is unmet despite the best intentions. Without our suggested amendment, S. 1894 could have the wholly unintended, undesired, and unfortunate result of placing a moratorium on approval of all agreements for a potentially extended period of time.

A third, more far-reaching amendment which the Committee may wish to consider would assert more aggressively the concept of Indian self-determination. This amendment would implement the American Indian Policy Review Commission's recommendation that tribes be authorized to override Interior's disapproval.[1] Under the Commission's recommendation, an Interior-disapproved mineral development agreement could become operative if, after due consultation with Interior, the tribal council elects to override the disapproval by a tribal resolution that waives the United States' liability for any "trust" abrogation directly resulting from the tribal override. Should the Secretary continue to feel that the agreement is not in the best interest of the tribe and fails to reflect the will of the majority of the tribal members, he could call for a tribal referendum.

The first two amendments we believe to be essential. The last is worthy of consideration, particularly given the concern raised at the Billings hearing by the Assiniboine and Sioux Tribes of the Fort Peck Reservation that the Presidential appeal provides a forum more favorable to the companies than the tribes. We submit that the adoption of either the first two amendments alone or all three amendments would provide greater Indian autonomy than could be exercised by the tribes and allottees in the role that the bill now assigns to them, and would continue to maintain the appropriate trustee functions in Interior.

Turning to our second major area of concern, we believe that the current bill language does not fully address issues of "transition" to the expanded authority of S. 1894. These issues relate to: (1) the approval of innovative agreements currently pending before Interior and awaiting the enactment of S. 1894; and (2) Congressional ratification of those agreements already approved by Interior. A discussion of the second issue is contained in the attachment to my testimony.

With regard to the first issue concerning currently pending agreements, and in light of the fact that Interior will have already undertaken a preliminary review of such agreements by the time of S. 1894's enactment, we believe it would be inequitable to allow the 1½-year delay in the completion of the review which would be possible under S. 1894 as presently drafted (i.e., 6 months to develop implementing regulations plus 1 year for review). Accordingly, we have suggested language to authorize, but not direct, Interior to approve or disapprove such pending agreements expeditiously, prior to the promulgation of regulations.

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[1] See recommendation 25 as contained in American Indian Policy Review Commission-Final Report-Submitted to Congress May 17, 1977 (G.P.O. 1977).

In conclusion, Mr. Chairman, we strongly support the concept and objectives of S. 1894. We respectfully urge the Committee to expeditiously consider the legislation and our proposed amendments, and to report favorably the amended bill.

I would be happy to answer any questions the Committee might have.

ATTACHMENT I

INTRODUCTION

S. 1894, introduced by Senator John Melcher on November 30, 1981, provides much needed authority for Indian tribes and individual Indians to enter into a wide variety of mineral development agreements (e.g., joint ventures, operating agreements, service agreements, leases) involving Indian-owned minerals. The objective of S. 1894 is laudatory and the measure merits enactment. However, several changes fully consonant with the purposes of the bill would improve its clarity and facilitate its implementation. A composite bill, reflecting the suggested changes to S. 1894, is provided in Attachment I.

1. Extent of rulemaking authority

As Senator Melcher has explained, his proposal is designed to "promote Indian self-determination" by providing an Indian tribe with "'greater flexibility" to negotiate the type of mineral development agreement it desires "just like any other person seeking to bargain with an energy company." Cong. Rec. S. 14127 (daily ed., November 30, 1981) (Senator Melcher's introductory remarks on S. 1894). He also stated that the "bill requires the Secretary to consider a tribe's proposed energy agreement" under a general trust review standard. Id. However, the desired tribal flexibility and Indian self-determination may be unduly compromised by the broad rulemaking authority delegated to the Secretary of the Interior ("Secretary") in S. 1894.

In order for an agreement to be considered by the Secretary, section 1 requires that an "agreement shall be for such term and be subject to such conditions as may be prescribed by the Secretary by regulation." The Secretary is thus provided with complete authority to dictate negotiating conditions, the form of permissible agreements, and specific agreement terms, even before talks between potential parties to an agreement are initiated. This broad rulemaking authority is complemented in section 5 by language (i.e., "the Secretary of the Interior shall promulgate rules and regulations to implement the provisions of this Act") suggesting that S. 1894 is not self-implementing, but rather is dependent upon the Secretary's discretion.

In lieu of this broad delegation to the Secretary, the objective of Indian self-determination would be served better by according the Indian tribes the primary authority to structure agreement terms. This would not result in a weakening or abandonment of the trust responsibility. Tribal authority should be supplemented by Secretarial guidelines, but not inflexible, constricting regulations. Also, any final agreement would still be subject to the exercise of the Secretary's trust responsibilities through application of the "best interest of the tribe" litmus test.

To accomplish this objective of Indian primacy, we suggest the deletion on page 2, lines 3–5, of the sentence: "Any such agreement shall be for such term and be subject to such conditions as may be prescribed by the Secretary by regulation." By this deletion, the Secretary will be required to consider any agreement negotiated by an Indian tribe. The following new sentence would be inserted in section 5: "The Secretary is authorized to publish guidelines on preferred agreement terms and negotiating conditions for the benefit of Indian tribes and individual Indians owning trust or restricted minerals, and to provide further guidance in negotiating agreements when requested by an Indian tribe or such individual Indian."

We believe that this concept of Secretarial guidance in the negotiating process, when coupled with the Secretary's overall "best interest of the tribe" review of the agreement, more clearly reflects the purposes articulated by Senator Melcher than does wholesale rulemaking by the Secretary on acceptable agreements and agreement terms. It does not appear possible to prescribe binding regulations on "fair" agreements (e.g., periodic renegotiation of terms, competitive bidding, advertising, acreage size) which always are in the best interest of the tribes. It would take far more expertise than that possessed by the Depart-

ment of the Interior, and several years instead of the 180 days allowed by section 5, to develop a full set of minimum terms and conditions regulations for each type of mineral development agreement which a tribe or allottee might wish to negotiate. Furthermore, these agreements and their terms and conditions can become obsolete in the future, as is now the case for 1938 Act leases and the minimum term and conditions set forth in regulations under that Act. S. 1894, as written could encourage a repetition of the 1938 Act experience by inviting, through regulation, an inflexible regime. Instead, whatever minimum terms and conditions the Secretary may wish to provide the tribes and allottees should be stated only as general guidelines for which there will be exceptions based on the resource characteristics; the tribe's risk aversion preferences; and the ranking of tribal employment, economic and environmental objectives.

By removing the regulatory language from section 1, which refers only to tribal agreements, and placing the substitute guidelines language in section 5, the amended bill would authorize provision of Secretarial guideline writing and technical assistance services not just to the tribes but also to allottees.

In order to make S. 1894 self-implementing and to place reasonable limits on the Secretary's rulemaking authority, it is recommended that the language of section 5, instead of directing the issuance of regulations "to implement" the Act, should simply authorize the Secretary to issue regulations "consistent with" the Act. This suggested change would allow the Secretary to promulgate needed rules (e.g., procedures governing Secretarial consideration of submitted agreements) that are consistent with the Indian self-determination objectives of the bill. This would also allow tribes to enter into agreements even if the Secretary's regulations are not forthcoming, are tied up in litigation, or do not expressly authorize a specific type of agreement or agreement provision. Although the bill now contains a 180 day requirement for issuance of regulations, we believe that the deadline certainly would be exceeded if those regulations must contain minimum terms and conditions for each form of agreement. While the regulation deadline is a valuable indicator of Congressional intent, it is virtually unenforceable if it is simply unmet despite the best intentions. Without the suggested amendment, S. 1894 could have the wholly unintended, undesired, and truly unfortunate result of placing a moratorium on approval of all agreements, for a potentially extended period of time.

2. Length of time for approval of pending agreements

The language of S. 1894 appears to allow a 1½ year delay in Secretarial approval of agreements pending on the date of the bill's enactment (i.e., 180 days for issuance of implementing regulations (section 5) plus 1 year for Secretarial review of a submitted agreement (section 1(a)), a time period which seems inordinately long. There are likely to be a number of pending agreements if S. 1894 is enacted in 1982 and each one will have already received, or be undergoing, an informal review. These pending agreements should not be permitted to languish in the Department for the full length of time allowed by S. 1894. The changes proposed in sections 1 and 5 to make the bill self-implementing would have the additional advantage of enabling the Secretary to approve agreements immediately after the enactment of S. 1894.

To ensure further an expeditious consideration of [illegible]ng agreements as well as those submitted after enactment but prior to rul[illegible]g, we recommend the following additional provision be inserted in section [illegible] *rovided*, That the Secretary shall not refrain from processing or withhold from approval any agreement pending before the Secretary on the date of enactment of this Act or submitted subsequently for Secretarial approval on the basis that such rules and regulations have not been promulgated." In addition to the section 5 language change, we recommend that the committee report state an intent that the Secretary not take the full one year review period for consideration of those agreements already pending Secretarial review at the time of enactment.

3. Length of time for approval of agreements submitted after enactment

The one year allowed for review of agreements in section 1 appears to be unnecessarily long even for agreements submitted after S. 1894's enactment. The section should be changed to permit only a six month review period, except where otherwise required to comply with other laws (e.g., National Environmental Policy Act of 1969).

4. Definition of authorized agreements

While section 1(a) would authorize Indian tribes to participate in "any joint venture agreement, operating agreement, joint production agreement, risk services

agreement, managerial agreement, lease . . . or other agreement," these terms are not defined in S. 1894 nor are all of them in common usage in the mineral industry. In order to employ accepted industry terminology and to clarify the legislative intent to authorize all forms of mineral development contracts, we suggest amending the above-quoted language (found on lines 3–7 of section 1(a)) to read "any joint venture agreement, operating agreement, production sharing agreement, production purchase agreement, service agreement, managerial agreement, lease agreement, or any other agreement, whether similar or dissimilar to the foregoing." In the alternative, the language could be changed to read "any type of agreement."

We also suggest the inclusion of legislative history describing the types of agreements mentioned in the bill and asserting the intent to authorize all forms of mineral development agreements. Without the inclusion of clarifying statutory language (i.e., "any other agreement, whether similar or dissimilar to the foregoing . . .") or legislative history on the intent to authorize all forms of agreements, we are concerned that the current statutory language may be interpreted to be restricted to specific classes of agreements. In the absence of an all-encompassing authorization of mineral development agreements, there is a risk that Congress would be recreating, albeit more broadly, the very problem it seeks to address in S. 1894—the limitation of permissible agreements to arbitrary classes (i.e., the present "agreement" language in S. 1894 instead of the "lease" language in the 1938 Act).

5. Better description of covered minerals

Section 1(a) currently is drafted to apply to "oil and gas, geothermal, or other mineral resources". Several recent cases have interpreted similar language narrowly, and there is a risk that S. 1894 could be construed to apply only to liquid and gaseous energy resources. See *Acker* v. *Guinn*, 464 S.W. 2d 348 (Tex. S. Ct. 1971) (reference to oil, gas and other minerals held to apply only to such an interpretation under principle of ejusdem generis). In order to prevent such an interpretation and to clarify the legislative intent that S. 1894 applies to all mineral resources, we recommend that the section 1(a) language quoted above be amended to read "oil and gas, geothermal, coal, hard mineral, or other mineral resources, whether similar or dissimilar to the foregoing,".

6. Ratification of prior agreements

One of the purposes of Senator Melcher's proposal is legislative ratification of legally vulnerable agreements between tribes and mineral companies previously approved by the Secretary. While there is considerable uncertainty concerning the authority under which these agreements were approved, in several cases it is arguable that these prior agreements were approved as "leases" under the 1938 Omnibus Indian Mineral Leasing Act (25 U.S.C. §§ 396a et seq.), which has been the Secretary's only generic authority for approving the disposition of tribally-owned minerals. As currently drafted, however, S. 1894 likely would not ratify these prior agreements approved as leases. In addition, with regard to any non-lease agreements which may be ratified, the ratification language is so broadly drafted that it would insulate such prior agreements from virtually all legal challenge.

Under section 3 of S. 1894, only "[a]greements of the type described in the first section" of the bill would be ratified legislatively. Section 1 specifically excludes "a lease approved pursuant to the Act of May 11, 1938" from the coverage of that section, leaving a strong implication that 1938 Act "leases" do not receive legislative ratification. Seeming confirmation of this interpretation is given by section 4. That section provides that nothing in the bill "shall affect the validity of any lease approved or hereafter approved" under the 1938 Act, thereby disclaiming any intent to affect the validity of previously approved 1938 Act leases.

The present language could be read to ratify the terms and conditions of all prior non-lease agreements and not just the legal authority of the Secretary to have approved them. The bill should certainly not place Congress in the position of insulating these agreements from challenge under equity or contract law or for violation of trust responsibilities.

The following language changes are suggested to amend S. 1894, so that the bill would retroactively ratify the Secretary's authority to approve mineral development agreements previously approved as 1938 Act "leases", without totally insulating these agreements from attacks on other grounds:

(a) Delete the parenthetical "(other than a lease approved pursuant to the Act of May 11, 1938)" from the current section 1 of the bill (lines 5–6 of page 1).

(b) Delete the current section 3 (page 2, lines 23–25, and page 3, lines 1–2) and insert the following new section 3:

"SEC. 3. The Secretary's authority to approve any agreement of the type described in section 1 which was approved prior to the enactment of this Act is hereby ratified as of the date of the Secretary's initial approval of the agreement: *Provided*, That nothing in this section shall be construed to preclude litigation on the validity of any such prior agreement on grounds other than the Secretary's authority to approve a particular type of agreement."

(c) Rewrite the current section 4 (page 3, lines 3–5) to read as follows:

"SEC. 4. Nothing in this Act shall affect the ability of an Indian tribe to elect to have a lease reviewed and approved pursuant to the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a et seq.)."

The alternative of relying solely on legislative history that discloses the intention to ratify specific lease agreements appears risky in light of the contrary plain meaning of the bill and the possibility that certain deserving agreements will be overlooked.

7. Determination of whether a lease is a 1938 Act lease or an S. 1894 lease

S. 1894 would preserve the leasing authority of the 1938 Act in addition to providing new authority to enter into leases (as well as other forms of mineral development agreements). We understand that the intent was to protect the 1938 Act authority for tribes that wish to be applicable. However, there is no provision in S. 1894 which establishes who determines—the tribe or the Secretary—whether the 1938 Act or S. 1894 standards are to be applied to a given "lease". The language suggested under point 6 (i.e., "Nothing in this Act shall affect the ability of an Indian tribe to elect to have a lease reviewed and approved pursuant to the Act of May 11, 1938 . . .") would assure that the Indian tribes make this election.

8. Review of initial disapproval of an agreement

Section 1(b) provides that a tribe shall have the opportunity for "Presidential review" if an agreement is disapproved by the Secretary. While not a crucial matter, we are uncertain as to the desirability of providing a lengthy administrative appeals process culminating in Presidential review of specific agreements. Instead, it may be more appropriate to restrict administrative appeals to the ordinarily applicable avenue of an appeal to the Secretatry to reverse the decisions of his subordinates. This result could be achieved by deleting the last sentence in section 1(b) ("Upon disapproval of a tribal proposal, the tribe shall have an opportunity for Presidential review provided that request for review is filed within thirty days."), and inserting the following sentence: "Upon disapproval of an agreement by any subordinate of the Secretary, the tribe shall have the right of an appeal to the Secretary for reconsideration if the appeal is filed within thirty days of the tribe's receipt of said subordinate's disapproval findings." At a minimum, we believe that an appeal to the Secretary, permitting him the opportunity to review the acts of his subordinates, should occur prior to a Presidential review.

9. Tribal override of Executive Branch disapprovals

A more far-reaching solution to the problem of Executive Branch disapproval of agreements desired by the tribes is the tribal override proposed by the American Indian Policy Review Commission. See recommendation 25 as contained in "American Indian Policy Review Commission Final Report—Submitted to Congress May 17 1977" (G.P.O. 1977). The relevant portion of the recommendation reads as follows:

"Legislation be enacted establishing that if the Secretary disapproves a tribal government initiative, contract, or other tribal action involving the use or disposition of a trust asset, the tribe shall be entitled to override such Secretarial disapproval using the following procedures:

"a. The Secretary shall supply the tribe with a detailed statement of the reasons for his disapproval of their proposed use or disposition of the trust asset, specifically setting forth the loss he believes may result from such tribal proposal.

"b. After due consultation between the representatives of the tribe and the Secretary or his representative, the tribal council may by formal resolution, elect to override the disapproval of the Secretary. Such resolution must contain a specific waiver of liability on the part of the United States for losses which may result as a direct result of the tribal override.

"c. In the consultation process, the Secretary shall be held to the highest standards of care and good faith consistent with the principles of common law trust in advising the tribes of potential consequences of the proposed tribal decision.

"d. A tribal override of a Secretarial disapproval shall not diminish the trust character of the asset in question. The trust responsibility of the United States to aid the tribe in the implementation of their decision and to protect the future well-being of the asset shall continue undiminished.

"e. In any case in which the Secretary has reasonable cause to believe that the decision of the tribal government may not reflect the will of the majority of the members of a tribe he shall (may) require a referendum of the tribal members, the expense of which shall be borne by the United States and not the tribe.

"f. In the event the Secretary determines that a tribal resolution should be put to a referendum, he must notify the tribal council within thirty (30) days of the passage of their resolution, and he must call for such referendum vote not more than forty-five (45) days after tendering such notification."

Although language embodying this change is not included in Attachment 1, the change is offered for consideration.

ATTACHMENT II

Set forth below is the text of S. 1894, as introduced, with the changes recommended by Mission Resources, Inc. Recommended new language is italic (except for the enacting clause); recommended deletions are in black brackets.

A BILL To permit Indian tribes to enter into certain agreements for the disposition of tribal mineral resources, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a), *pursuant to the procedures of this section,* any Indian tribe may enter into [any joint venture agreement, operating agreement, joint production agreement, risk services agreement, managerial agreement, lease (other than a lease approved pursuant to the Act of May 11, 1938), or other agreement] *any joint venture agreement, operating agreement, production sharing agreement, production purchase agreement, service agreement, managerial agreement, lease agreement, or any other agreement, whether similar or dissimilar to the foregoing,*[1] approved by the Secretary of the Interior (hereinafter referred to as the "Secretary") for the disposition of [oil and gas, geothermal, or other mineral resources] *oil and gas, geothermal, coal, hard mineral, or other mineral resources, whether similar or dissimilar to the foregoing,* of tribal lands, or for the sale of production from operations on tribal lands. [Any such agreement shall be for such term and be subject to such conditions as may be prescribed by the Secretary by regulation.] The Secretary shall approve any such agreement within [one year] *six months* of submission to him unless the Secretary finds that such agreement is not in the best interest of the tribe: *Provided, That the Secretary may extend the review period if he finds that additional review time is required by law.*

(b) Whenever the Secretary disapproves an agreement pursuant to subsection (a) he shall state his findings in writing within thirty days of making his decision. [Upon disapproval of a tribal proposal the tribe shall have an opportunity for Presidential review provided that request for review is filed within thirty days.] *Upon disapproval of an agreement by any subordinate of the Secretary, the tribe shall have the right of an appeal to the Secretary for reconsideration if the appeal is filed within thirty days of the tribe's receipt of said subordinate's disapproval findings.*

(Possible insertion of a subsection (c) setting forth the recommendation of the American Indian Policy Review Commission for tribal override of an Executive Branch disapproval.)

SEC. 2. (a) Individual Indians owning trust or restricted minerals within the boundaries of a reservation subject to an agreement entered into pursuant to section 1 of this Act may join in such an agreement with the tribe, subject to the approval of the Secretary.

(b) The Secretary at his discretion may approve agreements listed in section 1 for individual Indians owning trust or restricted minerals.

SEC. 3. [Agreements of the type described in the first section of this Act for the development of production of oil and gas or other mineral resources of tribal lands approved by the Secretary prior to the date of the enactment of this Act are hereby ratified as of the date of such approval.] *The Secretary's authority to*

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[1] Alternative new langugage: "any type of agreement".

approve any agreement of the type described in section 1 which was approvedpri or to the enactment of this Act is hereby ratified as of the date of the Secretary's initial approral of the agreement: Provided, That nothing in this section shall be construed to preclude litigation on the validity of any such prior agreement on grounds other than the Secretary's authority to approve a particular type of agreement.

SEC. 4. Nothing in this Act shall affect the [validity of any lease approved or hereafter approved] *ability of an Indian tribe to elect to have a lease reviewed and approved* pursuant to the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a *et seq.*).

SEC. 5. [Within one hundred and eighty days, the Secretary of the Interior shall promulgate rules and regulations to implement the provisions of this Act.] *The Secretary is authorized to promulgate such rules and regulations as are consistent with this Act: Provided, That the Secretary shall not refrain from processing or withhold from approval any agreement pending before the Secretary on the date of enactment of this Act or submitted subsequently for Secretarial approval on the basis that such rules and regulations have not been promulgated. The Secretary is authorized to publish guidelines on preferred agreement terms and negotiating conditions for the benefit of Indian tribes and individual Indians owning trust or restricted minerals, and so provide further guidance in negotiating agreements when requested by an Indian tribe or such individual Indian.*

Senator MELCHER. We will now have another short recess and then we will conclude the hearing.

[Recess taken.]

Senator MELCHER. The hearing will come to order.

Our next witness is Marvin Sonosky, counsel for the Fort Peck Tribes, representing the law firm of Sonosky, Chambers, Sachse, of Washington, D.C.

Please proceed, Marvin.

STATEMENT OF MARVIN SONOSKY, COUNSEL, FORT PECK TRIBES, SONOSKY, CHAMBERS & SACHSE, WASHINGTON, D.C.

Mr. SONOSKY. Good afternoon, Mr. Chairman. I wish immediately to allay your mind. I will not read this long statement.

In the course of these hearings, and listening this morning it seems to me that there is a forgotten man here. Nobody has said a word about the individual Indian, but a major portion of the trust oil and gas in the United States is owned by individual Indians and under S. 1894, solicitors, brokers, speculators could go out and meet with uneducated, uninformed, unsophisticated, naive Indians who have no concept of business of this complicated nature and negotiate leases with them.

Now, my concern really is—to a great extent, this legislation would not be necessary if the Secretary of the Interior would exercise the powers that he has under the 1938 act.

As you know, under the 1938 act, tribal oil and gas leases can be acquired only at competitive sale, but individual oil and gas leases can be acquired by negotiation. The statute does not impose the requirement of competitive sale on individual Indian oil and gas.

How much confidence are we going to have in the Department of Interior that has responsibility for this trust oil and gas when we find that they have waived the regulation which was imposed to require that individual Indian oil and gas be sold at competitive sale the same way as tribal. Congress said it was good for tribes. The Secretary of Interior for some 40 years has said that if it is good for tribes, it ought to be good for individual Indians. Much more so.

Yet, last year, the new Assistant Secretary for Indian Affairs issued an order waiving the requirement that individual Indian oil

and gas leases be acquired by competitive sale and authorized negotiation of those leases. Now, this was accomplished by the Solicitor first determining that there could be no lease except by competitive sale; then pointing out that competitive sale was not required for individual Indians, I am informed that the Solicitor advised the assistant Secretary for Indian Affairs that individual Indians could negotiate leases. Following that, a corporation was formed by prominent Indians on the Fort Peck Reservation.

That corporation was formed because the corporate founders were told that it would have authority to solicit leases from individual Indians on the reservation, and it did. The corporation went to the various members of the industry. I have this as shown on one of the exhibits here. One of the letters that was sent out through the corporation's attorney was to ARCO. ARCO was the same company that is making the deal with Northern Cheyenne.

ARCO sent the letter back to Interior. Apparently, ARCO was not interested. The proposal was that this corporation which was soliciting leases from individual Indians at Fort Peck would be in a position to obtain a block of oil and gas land from individual Indians, controlling 4,000 to maybe 25,000 acres; that there would not have to be any competitive bids; and that if a company were interested, it could work out a deal whereby after payout, the soliciting corporation would share in the gross.

Now, my point is that if there is enough velvet in this business so that somebody can go out and hustle a lease from an uninformed Indian and then peddle it to a member of the industry, why isn't there enough velvet with proper administration, for the Interior Department to accomplish the same result. It has the power but it has never exercised it.

Interior, under existing law—under the 1938 act, sits quietly. If an oil company is interested in a piece of tribal land or individual oil and gas, the oil company requests the agency to put it up for sale. The oil company generally camouflages what it wants. It may be interested in some 2,500 acres. It might ask for 25,000 acres. I have seen them ask for 100,000 acres.

The agency immediately gets busy and examines the title on all the land that is being asked and advertises it for sale. The Secretary's regulations provide for at least 30 days notice and that is a short time. So, there used to be no competition. The land is put up for sale and the companies come in and bid, and the high bidder gets it. The royalty was one-eighth for more years than I care to remember. Just recently the Commissioner awakened and announced that from now on it is going to be one-sixth.

In 1962 when we recommended that the royalty rate be raised from one-eighth to one-sixth, you would have thought the world was going to fall apart. The Department of the Interior and the Geological Survey opposed the increase, saying the tribes would not get any bids. But the royalty was raised to one-sixth on that particular reservation and it never affected the bids. Now that tribes are getting 25 percent and 30 percent and, in some instances, we have gotten 40 percent, Interior is coming up with one-sixth.

There is nothing in the law that says a lease has to be for 10 years. The law says the lease may not—the term may not exceed 10 years. But the statutory maximum becomes the Secretary's minimum.

Every regulation, every provision in the form of lease that the Secretary puts out for trust oil and gas stems from industry. It stems from industry because industry was responsible for the Mineral Leasing Act of 1920, and all the forms under it, and Interior simply adapted trust oil and gas leases to those forms.

There is nothing to prevent the Secretary from permitting leasing for the lease for a term of 5 years, and we have had 5 years in reservations I represent for at least 10 or 15 years. And the way that is done is that when a tribe offers oil and gas for lease sale, it puts it up for sale on the condition that the term not exceed 5 years; that the royalty be 25 percent, and on the same basis there are a number of other conditions that can be put into the leases.

I have outlined some of them. I think they are on page 6. For example, we have situations where a company has a lease and unless—a lease may cover as much as 2,560 acres with a single well producing a barrel of oil a day. One barrel of oil a day. Because of the terms of the lease, all the lower horizons, some of which have potentials, cannot be touched because that lease is being held by production in paying quantities.

Now, there was a time when oil was selling for $3 a barrel and paying quantities did not mean one barrel, but today at $30 a barrel, the definition of paying quantites as put out by the Geological Survey, and under the law, permits that. It does not have to be that way. That paying quantity provision can be modified.

The manner in which land is offered for lease sale can be modified. If an Indian owns 18 acres of land, the Bureau with put up his 18 acres. If an Indian owns 640 acres of land, they will put up his 640 acres. But if that is oil country, that 640 acres should be put up in four leases of 160 acres each so that one well will not hold it without further development.

I am not going to go through all the various changes that could be made in the lease form, but, my Lord, there has to be something done in that Department with respect to administration of these things. The first thing that should be done is that the lease form should be modified.

I also point out that the tribes now have power despite the Solicitor's ruling, that leasing is the exclusive way of disposing of tribal oil and gas. The tribes own their own grass; they own their own agricultural land; they own their own timber, and there are laws of Congress that authorize the Secretary to lease land for grazing; to lease land for agriculture; to sell the timber for lumber. The tribes have their own ranches and they have their own farms. They have their own sawmills and there is nothing to prevent them from drilling their own wells. There is nothing to prevent them from hiring a contractor and drilling their own wells, and we have prepared such an agreement and have submitted to the Secretary and it has been approved and it does not need ratification because it is valid.

But there are agreements that are invalid or imprudent which the Secretary has approved under 25 U.S.C. 81 because they, in fact, are leases. He has approved them outside the authority of the 1938 act. Those leases are of doubtful validity. But, if those leases were imprudent or improvident that they are not a good business deal for the tribe, why in the world should they be, as witnesses here testified, grandfathered in. They should not be. They should be left

open and there are some of them that are regarded among the profession as being of very doubtful financial benefit to the tribe.

The other thing that I find very disturbing in S. 1894 is the absence of any provision or any concern of just how is the Secretary going to exercise this trust responsibility. When do you need help? If you are a mineral owner of consequence and a company comes to you with a proposal, when do you need help? You have got to go then and there and find yourself an oil and gas consultant. Perhaps a petroleum engineer or geologist. You have to be informed when you sit down to negotiate. Under this bill, the Commissioner now has people out hustling individual allottees, and picking up leases from them. Now, under S. 1894, he would let tribes who may or may not have help—our clients do have both oil and gas consultants and legal help, but others do not—who do not have that kind of help, negotiate a deal.

There is no comparison between the two players of this game. It is not a game that an Indian tribe should be engaged in unless it has the kind of help that it should have. The Secretary cannot exercise his trust responsibility until Congress and he see to it that he has the help. And insofar as I know, they do not have it.

I was interested to hear this morning the representative from the Department of the Interior tell the committee that they were going to try to handle these things at the lowest echelon. They were going to see how fast they could get them out. That is what he had in mind. He did not have in mind getting the most dollars out of the deal for that individual Indian or the tribe, and that is our business. That is really what happens when one of these complicated deals comes through and, believe me, they are complicated. I have negotiated several of them. The negotiated contract goes to the superintendent. The superintendent feels absolutely helpless. He calls on the Geological Survey. The Geological Survey does not consider itself as representing the tribe. The Geological Survey considers itself as the delegate of the Secretary of the Interior, his special adviser on technical matters of this kind, but not the tribes' adviser. So much so that there was one period when I received a letter from the Director of the Geological Survey advising me that if I had any communications to make to the Geological Survey, or any of its staff, I should address them to the Commissioner of Indian Affairs because he was not responsible for Indian tribes, he was only responsible as a technical adviser to the Secretary. That has changed. Now, they let us write to the Geological Survey.

Then the superintendent gets a reply back from the Geological Survey. The Geological Survey generally is a conservation-minded organization. Its interest is in seeing that much of the oil that is in the ground gets out of the ground because if it does not get out, it is lost. So, it is interested in efficient operation of the extraction process, the production process, but it is not interested in the economics. It does not have the financial background. It is not equipped and it does not pretend to be. And it fairly uniformly goes along with the dollar aspects of a proposition. It might make suggestions as to changes in the complex agreement that fit with their regulations, but insofar as the dollar amounts are concerned, USGS does not breathe a word.

So, there we are, We are going to have these agreements done at the lowest level; we are going to have them administered without any

conditions, without any advice to the people, without any advice to the tribe or to the individual Indian that needs it the very most, and that is our concren. The bill is too broad.

I am not saying that the 1938 act could not stand an overhaul. It can. But I think it needs an overhaul by somebody who knows the business, both sides of the business, the industry side and the tribes' side; somebody who can make the necessary study and prepare the act in a fashion that will not put the Secretary under compulsion to protect the individual interests of the Indians. The oil companies and the mining companies will be protected when they do get a lease or a contract because they will know that it will be a solid one and it will not be subject to attack.

Thank you, Mr. Chairman.

Senator MELCHER. I think that the changes in the lease terms would be permitted under the bill at the discretion of the tribe or the individual Indian owner, but I guess what you are telling us, Marvin, is that it ought to be spelled out that it must be required in the act itself that there be changes in the lease?

Mr. SONOSKY. I am in the midst of negotiating an oil and gas contract now, and under the terms of this contract—it is a major company—they would be given a block of land. I never in the world would consider recommending to my tribe that I turn the whole tribal oil and gas over to one company, never. They will be getting an area of land subdivided into blocks. Under the terms of the proposed agreement the company would pay an agreed royalty, let us say, 30 percent. That is a lease.

A company would pay an agreed bonus, which can vary. It depends on the negotiators, but it is not going to amount to anything like $20 or $25 an acre that I hear from Northern Cheyenne. The company would also be required then to develop the land within specified periods and develop it by blocks, each within a specified time. If block one is successful, they can go on with block one, but then they have to go to block two and so on.

Now, when the solicitor came out and said, well, I am not going to approve any of this kind of agreement because it is a lease and you have to put it up for competitive sale. I said to this company, "What would you think if we drew this up as a lease and put it up for competitive sale?" They said, "No objection." They said, "Our economics tell us that we can do this much for it. Now, if somebody else's economics tell them they can do more, they are welcome to come and bid."

There is nothing to prevent the Secretary from doing the same kind of thing except that he has put the Commissioner of Indian Affairs in handcuffs. He has not given him a petroleum engineer, or a mining engineer, or a geologist, or a lawyer who has had special training in the field. It is a stultifying situation. We are dealing here with the most valuable asset Indians and Indian tribes have. Even more valuable than land whenever it is producing oil and gas.

Senator MELCHER. In representing the Fort Peck Tribes, is most of the land, and the minerals attached to it, owned by individual Indians?

Mr. SONOSKY. Yes, at Fort Peck, I think that something more than 90 percent is owned by individual Indians.

Senator MELCHER. How was the last lease sale handled then?

Mr. SONOSKY. The last lease sale was a competitive oil and gas lease sale.

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Senator MELCHER. On all those consenting?

Mr. SONOSKY. With the—yes, and with the sealed bids and oral auction following the sealed bids, and the 25-percent royalty.

Senator MELCHER. But the individuals consented to block their land?

Mr. SONOSKY. The individuals joined in that—the individual land is most of the land. No, the tribes blocked their lands because we recommend it to them.

Senator MELCHER. But that was about 10 percent of the land?

Mr. SONOSKY. But, you know, a company wants to come in and bid on a piece of land. Well, here is an Indian that has got 40 acres over here and here is an Indian with 40 and another one with 80. If you put them altogether, you would have 160 acres. You would make an attractive block. They do not do it. They just put them up by ownership.

Now, when the tribe has a piece of land and next door to it there is a piece of individually Indian owned land, we recommend that the tribes' land and the individually owned land be put together and put up as a single block and we divide income on the basis of of surface acreage because nobody knows a better way. And it can be done. The Bureau just is not administering this thing. It is just looking at it.

Senator MELCHER. Thank you very much, Marvin.

Mr. SONOSKY. Thank you.

Senator MELCHER. Your statement and attachments will be entered in the record at this point.

[The statement follows. Testimony resumes on p. 136.]

PREPARED STATEMENT OF MARVIN J. SONOSKY, ATTORNEY, SONOSKY, CHAMBERS SACHSE & GUIDO, WASHINGTON, D.C.

My name is Marvin J. Sonosky. I am a partner in the law firm of Sonosky, Chambers, Sachse & Guido, with offices at 1050 31st Street, Northwest, Washington, D.C.

Mr. Chairman and members of the Committee, I appreciate the opportunity you have afforded me to testify on behalf of our tribal clients, particularly those with oil, gas and other mineral holdings.

S. 1890 would make sweeping changes in existing law governing the disposition of Indian trust oil and gas. Under present law, tribal oil and gas are governed by different statutes. Under a 1938 Act, tribal oil and gas must be offered for public lease sale "to the highest responsible qualified bidder, at public auction or on sealed bids after notice and advertisement, upon such terms and subject to such conditions as the Secretary may prescribe".[1] The 1938 Act limits the terms of any lease to "not to exceed ten years and as long thereafter as minerals are produced in paying quantities". Except for this limitation the Secretary has practically unrestricted powers. He may reject all bids he may re-advertise, or, with the consent of the tribe, he may lease by private negotiation.

Trust oil and gas owned by individual Indians is governed by a 1909 statute as amended.[2] The 1909 Act vest the Secretary with even broader powers than he possesses over tribal oil and gas. The 1909 Act does not require the Secretary to offer individual oil and gas at public lease sale. The Secretary can approve leases negotiated by allottees. The law provides no limit on the term of the lease. The Secretary is empowered to permit allottees to lease their oil or gas or other minerals "for any term of years," with unfettered power to do what is "necessary" to accomplish the lease. With the recent exception of Fort Peck allottees, that I shall later discuss, the Secretary has consistently recognized that no justifica-

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[1] Act of May 11, 1938, c. 198, sec. 2, 52 Stat. 347 (25 U.S.C. 396b). The implementing regulations are in 25 CFR 171.1–171.30.

[2] Act of March 3, 1909, c. 263, 35 Stat. 783, as amended (25 U.S.C. 396). The implementing regulations are in 25 CFR 172.1–172.33.

tion can be found for the trustee to give less protection to the allottees' oil and gas than Congress requires that he give to tribal oil and gas. For that reason the Secretary, through his regulations, has administered individual oil and gas on the same basis as tribal oil and gas. His regulations for individual oil and gas call for the same public lease sale as is required by the 1938 Act for tribal oil and gas.

S. 1894 is an industry-oriented, not trustee-oriented, bill. The bill would prospectively do away with present law. The bill in effect would athorize Indians to enter into private negotiations with high-powered and thoroughly informed members of industry for a lease, or any other kind of a contract relating to trust oil, gas and other minerals, so long as the Secretary approves the product of such negotiations.

Section 1 of S. 1894 would remove all statutory protection and limitations except for Secretarial approval of the negotiated lease or contract. That section would permit any tribe to enter into a lease or any other from of contract that the Secretary is willing to approve, relating to the development, production, or disposition of oil, gas, or any other mineral.

Section 2 of S. 1894 would extend the same unlimited privilege of negotiating leases or other contracts to individual Indians, so long as the Secretary approved the negotiated instruments. In addition, under Section 2, the allottee, with the Secretary's approval, could include his land in any lease or contract that the Tribe negotiated.

Section 3 of S. 1894 is a savings provision that would retroactively make valid what may now be void, or unwise, or improvident contracts, even though approved by the Secretary.

S. 1894 deals with trust property—property held in the name of the United States in trust for a tribe or individual Indians. I start with the premise that the Federal trustee must act, as would any trustee, to protect and conserve the trust property for the exclusive benefit of the tribal or Indian owners. The Supreme Court has said that the Government "has charged itself with moral obligations of the highest responsibility and trust. Its conduct * * * should therefore be judged by the most exacting fiduciary standards." *Seminole Nation* v. *United States*, 316 U.S. 286, 296–7 (1942).

Translated, this means that tribes and allottees are to have their minerals managed for their benefit—not the benefit of the United States, or the industry. Tribes and allottees are entitled to receive as much from their trust minerals as would result from arms-length negotiations between two informed mineral owners, both experienced in the business of negotiating oil, gas and other mineral leases and contracts. That is the measure of the trustee's obligation.

S. 1894 does not meet that obligation. As to oil and gas, the bill does away with the only protective feature in the 1938 Act—namely, public lease sale, where industry must compete for leases by sealed bid and oral auction. The bill would match uninformed and uneducated Indians against highly sophisticated, informed and educated geologists, petroleum and mineral engineers and lawyers specializing in oil, gas and minerals. The product of negotiations between such disparate players would be a lease or other contract disposing of high-value oil, gas and other mineral rights. That is the instrument that would be submitted for Secretarial approval—which, in real life, usually means someone in the local agency or Area Office who has limited or no qualifications to sit in review. Yet his recommendation is usually the one that goes. Up to now, that is about what Secretary approval amounts to.

When Congress adopted the 1938 Act, present law, Congress was aware that tribes had been the victims of improvidently negotiated leases approved by the Secretary of the Interior. During the debate, Senator King stated (79 Cong. Rec. Part 8, p. 7815):

"Mr. President, for a number of years past there has been some complaint that the Indians have been partly despoiled of their property by reason of improvident leases having been made, that the white people have gone into their lands and obtained leases and exploited the Indians."

This may well be the reason that Congress, in the 1938 Act, made statuatory the requirement that no tribal oil and gas lease could be obtained except by competitive public lease sale. Congress did not leave this critical provision to Secretarial regulation.

Keep in mind that the 1938 Act was written during a period when posted oil prices were as low as $1 per barrel and gas contracted at 10 cents or 12 cents per thousand cubic feet. In those days the dollar profit to the producer or working interest was relatively small. Today oil sells for $30 or more per barrel, gas for up

to $4 per thousand cubic feet. The dollar profits for the working interests are immense. Today, when a ⅛ royalty is paid there is $25 left for the working interest. The working interest can afford to give up more to the mineral owner.

Industry has an intense interest in reservation oil and gas. Outside the Federal reserves, Indian reservations are the only areas left where sizeable blocks of land are available for oil and gas development. Industry can lease the non-Indian minerals on reservations by negotiation. But to assemble a block of contiguous tracts large enough to justify major development, industry must compete by sealed and oral bids for trust oil and gas leases at public sale. When industry does so bid, the tribes and allottees are the beneficiaries. Companies compete to gain lease control of the huge profit potential in oil and gas. High bonuses are bid, high royalties are paid.

How much nicer for industry to negotiate a deal without competition. Much like taking candy from a baby. There are places where industry charmers and persuaders would bear down on the key council members and on individual allottees. The way would be opened for side money, bribery, graft and corruption—a return to precisely the conditions that led Congress to write into the 1938 Act the competitive lease sale provision that is now in the 1938 Act and the regulations.

There is no use deluding ourselves. Once a tribal council approves a deal, the Secretary invokes pious words about the Indian Self Determination Act and approves. There is no in-depth examination of the deal. Should the Secretary hesitate with his approval, he is ever so gently urged by the industry muscle men to make the right decision. Industry's representatives in Washington are among the most influential of the influential. The tribes provide no competition. Nothing is done until the situation becomes scandalous and the media enters. Witness "60 Minutes" and the oil theft.

This is not to say that the present law and administrative system does not need change. It does. The manifold increase in mineral values, especially oil and gas, calls for changes. But the changes do not require abandonment of the limited safeguards now available. The 1938 Act provides the framework for amendatory legislation that would result in more protection to the trust asset—changes that would come closer to giving the Indian and tribal owners the fair value of their production; insure continuing development; limit the terms of leases so as to release undeveloped horizons after a given period; increase the royalty; increase the rent and make it nondeductible from royalties on production; redefine "paying quantities" so that undeveloped lower horizons cannot be held indefinitely because the lessee is producing one barrel a day from an upper horizon; write in compensatory royalty provisions that have meaning; stop leasing non-contiguous blocks of land; stop leasing blocks larger than 160 acres for oil and 640 acres for gas (at present, a single producing well will hold an entire lease so long as the well is producing in "paying quantities", which the Geological Survey has ruled can mean one barrel a day); impose conditions on the grant of consent to unit agreements to provide for additional compensation, to insure development within a reasonable period and deny consent when it is not in the trust lessor's interest (at present, the Geological Survey almost routinely recommends consent to unit agreements without regard to the economic effect on the trust lessor's interests); require the lessee to furnish the tribe and individual Indian lessors with monthly reports exactly as the lessees now do for non-Indian lessees; regularly and consistently collect the royalties and rents and promptly remit them to the Indian owners; impose penalties on the lessees for failure to pay on time; and monitor the lessee to be sure it is not stealing. These are samples of actions that knowledgeable operators routinely negotiate.

The Secretary now has power to do every one of these things, under present law. But in 44 years he has not changed his lease form or his regulations to take care of such items.

Some tribes have managed to include many protective and financially beneficial provisions in their lease contracts by making them conditions of the sale. Such tribes, and that includes our clients with oil and gas, hire qualified, independent oil and gas consultants and legal advisers. Most tribes, and probably all allottees, have no such advice available to them. The Bureau has no petroleum engineers, mining engineers or lawyers specially qualified in oil and gas, unless they are recent acquisitions. Certainly individual Indians have no access to expert assistance. Such help is needed prior to and during negotiations. The bargain is struck in the negotiations. That is where expert assistance is required. S. 1894 makes no provision for protection and advice at the critical time when a company or its broker is soliciting and negotiating a lease or contract from an uninformed tribe or from any allottee.

Perhaps in an effort to put a better face on S. 1894, Interior recently has done two things. First, the Solicitor's office made known that the Secretary would not approve any agreement or contract relating to tribal oil and gas unless it was a lease acquired at competitive sale under the 1938 Act. Second, without notice in the Federal Register, the Acting Assistant Secretary for Indian Affairs waived the regulation that requires the public lease sale of individual Indian trust oil and gas so as to confer on one corporation the right "to obtain oil and gas leases on the Fort Peck Reservation on allotted lands without going through the competitive bidding procedures." (Exhibit A, Memorandum from Field Solicitor, Billings, to Area Director, Billings.)

Interior is wrong on both scores. I discuss them in inverse order. Interior had apparently assured an educated and influential Indian on the Fort Peck Reservation that the regulation requiring competitive lease sales for alloted oil and gas would be waived for Fort Peck if he wished to solicit leases from allottees. The Indian organized a corporation for that purpose.

On August 17, 1981 the Acting Deputy Assistant Secretary for Indian Affairs waived the regulation (25 CFR 172.4) for that particular corporation to enable it "to obtain oil and gas leases on the Fort Peck Reservation on allotted lands without going through the competitive bidding procedures." (Exhibit A.)

Subsequently, the Bureau of Indian Affairs reported that the corporation apparently had approached oil and gas companies with a joint venture proposition. The Bureau of Indian Affairs reported that "[i]t has come to our attention that a California Attorney, John J. (Jack) McNamara, has been soliciting the possible coventuring of the [corporation's] operation with several major oil companies." (Exhibit B, Memorandum dated October 16, 1981 from the Area Director, Billings, to all Superintendents, Billings Area.)

The letter from the corporation's attorney referred to in Exhibit B is dated September 18, 1981 and addressed to ARCO Exploration Co., stating, among other things:

" * * * My client has recently been granted the exclusive right to obtain noncompetitive oil and gas leases on alloted lands within the Ft. Peck Reservation by the Bureau of Indian Affairs.

" * * * This is the first time a waiver of this competitive bidding procedure has been granted to a private firm in such a situation."

The attorney's letter goes on to propose a joint venture, ARCO to advance all costs and, after payout, to split the gross with the corporation. (Exhibit C, letter dated September 18, 1981 from John J. (Jack) McNamara, attorney-at-law to ARCO Exploration Co.)

This action by Interior is contrary to established policy running back to 1938. Interior has consistently discouraged speculators. Now it is sponsoring them. Further, Interior's action is discriminatory because it is aimed at Fort Peck allottees alone. The action may be unlawful. Interior kept it quiet. No publicity. No notice in the Federal Register of a departure from 40-year-old regulations.

But look at the substance. How can Interior know whether whatever consideration was promised for the leases solicited from the allottees ever will be paid? Interior does or should know that the corporation does not have the funds to pay the allottees the amounts promised. To get those funds, the corporation has to peddle the leases it solicits. Apparently ARCO turned them down, but some other company may have provided financial backing. What Interior is doing is sponsoring a speculator who, with Interior's affirmative help, is soliciting leases from uneducated and uninformed Indians and attempting to hawk them. Even if the consideration promised the allottees were paid, how does Interior know that it reflects fair market value? Interior ought to know from the deal suggested in the attorney's letter to ARCO (Exhibit C) that, whatever the lease solicitor offers the allottee, it has to be less than the fair market value.

If splitting the gross after payout is a good deal for the soliciting corporation, why not for the allottee? What prevents the Secretary under present law from assembling a block of allotted and tribal oil and gas land attractive to industry and offering it for competitive leasing with bids to be received for bonus, for royalty and for a percentage of the gross after payout, or other combinations. What is needed is an administrative will to act as would an informed and prudent trustee to obtain the maximum for the trust beneficiaries. Oil and gas cannot be managed by default, or for administrative convenience, or by turning the job over to a speculator.

I turn now to Interior's action in holding that tribal oil and gas cannot be disposed of in any way except by competitive lease under the 1938 Act. First of all, as just pointed out, the 1938 Act does not prevent the Secretary from

offering tribal and allotted oil and gas for competitive leasing with bids to be received for bonus, for royalty and for a percentage of the gross after payout, or other combinations. Nor does it limit the Secretary as to the size of the block offered.

Second, Interior is wrong in taking the position that the 1938 Act bars a tribe from developing its own oil and gas. The oil and gas belongs to the Tribe just as does the tribal grass used for grazing, the tribal land used for agriculture, or the tribal timber for lumber. The fact that statutes provide for leasing tribal grazing land and for leasing tribal agricultural land and for the sale of tribal timber does not prevent a tribe from running its own ranch, or farm, or sawmill—and tribes do. Similarly, nothing prohibits a tribe from drilling its own well and producing and using or selling oil and gas. To do the job the Tribe can hire a contractor and pay him. And the Secretary has approved such contracts. They are not leases and they need not be.

A contrary view can be reached only by stretching and torturing the law beyond recognition. By taking the inflexible attitude that tribal oil and gas can be disposed of by 1938-Act leases and no other way, the Secretary is painting a false picture for Congress. The Secretary is saying that he must abandon existing law and be given carte blanche to approve any kind of agreement relating to trust oil and gas that is negotiated by his uninformed and uneducated wards.

The point I make is that the 1938 Act can be amended to retain the competitive lease sale provision and to add authority for development contracts with circumscribed safeguards. Such legislation would put the explicit burden on the Secretary to take the same action as would an informed and prudent oil and gas owner to obtain the maximum dollar benefit possible. The legislation would make void any lease or contract obtained by fraud or bribery or misrepresentation of critical facts. The preparation of such legislation is simply a matter of knowledgeable draftsmanship by a non-industry source. What is needed most is proper concerned administration, not a wholesale legislative departure from existing law.

Paul C. Smith

UNITED STATES GOVERNMENT

memorandum

DATE: OCT 16 1981

REPLY TO ATTN OF: Real Property Management

SUBJECT: Fourstar Resources Inc., Waiver of 25 CFR 172.4 (b)

TO: All Superintendents, Billings Area

FROM: Area Director, Billings Area

On August 28 we sent each Superintendent a memorandum about an Indian organization called Fourstar Resources, Inc., which intends to develop certain allotted lands on the Fort Peck Indian Reservation. At the same time we sent each of you a copy of a memorandum dated August 17, 1981, from the Acting Deputy Assistant Secretary for Indian Affairs (Operations) to this office. That memorandum explained why the venture was being regarded favorably by the Central Office. It also set down some strict guidelines for the corporate operation.

It has come to our attention that a California Attorney, John J. (Jack) McNamara, has been soliciting the possible conventuring of the Fourstar operation with several major oil companies. We enclose a copy of his letter to Arco Exploration Company in Denver, Colorado, who brought it to our attention. The McNamara letter alleges that Fourstar has done things it has not done such as, "Fourstar has already assembled a 4,000 acre plus land package in the Fort Peck area and will have an additional 20-25,000 acres under its control in the very near term." It also alleges the Fourstar can do things that it cannot do, "Nor are Fourster's Activities limited to the Fort Peck Reservation."

We thought we had made it abundantly clear to the Officers of the Fourstar Corporation that this waiver is for Fourstar only and confined to the Fort Peck Reservation only. The waiver instrument at point 2 stated in pertinent part, "This waiver is not intended to give Fourstar Resources, Inc., a so-called "blank check". Although support for this waiver was not enthusiastic in the Central Office it was approved because the Bureau encourages Indians to make their own decisions. We have given Fourstar an opportunity to do something on their own but they must stay strictly within the guidelines. If there are any further irresponsible solicitations for this venture we will recommend that the waiver be withdrawn.

/S/ Paul Kipp

Acting Area Director

Enclosures: Field Solicitor's Memorandum
McNamara's letter of September 18

Buy U.S. S

EXHIBIT A
Statement of Marvin J. Sonosky
Senate Select Committee on Indian Affairs
S. 1894--March 15, 1982

United States Department of the Interior
OFFICE OF THE SOLICITOR
P.O. BOX 1538
BILLINGS, MONTANA 59103-15

October 1, 1981

Memo 5 to 31, 0 Neal agency and letter to McNamara Neal

Memorandum

To: Area Director, Indian Affairs, Billings

From: Field Solicitor, Billings

Subject: Waiver of 25 CFR § 172.4 given to Fourstar Resources, Inc.

On August 17, 1981, the Acting Deputy Assistant Secretary for Indian Affairs, Kenneth L. Payton waived a section of the regulations at 25 CFR § 172.4 to enable Fourstar Resources, Inc. to obtain oil and gas leases on the Fort Peck Reservation on allotted lands without going through the competitive bidding procedures.

This waiver of the regulations in favor of Fourstar Resources, Inc. is a conditional waiver and is limited to that corporation and the Fort Peck Reservation. The waiver does not bind the Bureau of Indian Affairs to approve an oil and gas lease obtained by Fourstar with an allottee. If the Bureau of Indian Affairs in its discretion decides that the lease is not in the "best interests" of the individual allottee or allottees involved, the lease need not be approved.

When a lease is submitted by Fourstar to the Superintendent, Fort Peck Reservation, for approval the Superintendent or his staff must counsel the allottees involved as to the proposed lease arrangements in order to fully apprise them of the lease conditions involved. These counseling sessions must be fully documented and it is highly recommended that a complete transcript of these sessions be made.

Moreover, each and every landowner will be required to sign leases as to their own retained interests.

This recapitulation of the waiver provisions conditionally given by the Deputy Assistant Secretary was prompted by a letter our office recently obtained. That letter (copy attached) was sent to the ARCO Exploration Company by John J. McNamara, Esq., of Los Angeles, California, as legal representative of Fourstar Resources, Inc.

EXHIBIT B
Statement of Marvin J. Sonosky
Senate Select Committee on Indian Affairs

We were disturbed by some of the representations made in that letter by Mr. McNamara; particularly those paragraphs which represent that Fourstar has 4,000 acres under its control and has the ability to obtain 20-25,000 additional acres. The waiver provisions do not grant to Fourstar control over any amount of acreage, only the possibility of obtaining non-competitive leases if they meet with Bureau of Indian Affairs approval. Thus, the control aspect over substantial acreages within the Fort Peck Reservation is overstated at best.

Paragraph three, in our opinion, is an outright misrepresentation of the terms of the waiver, inasmuch as it leads one to believe that Fourstar has the capability of obtaining non-competitive allotted leases on other reservations. This is simply untrue, since the waiver is strictly limited to the Fort Peck Reservation.

We strongly advise that this situation be closely monitored and that any and all proposed leases presented to the agency be closely scrutinized. In addition, we believe that consideration should be given by your office to decline to exercise the waiver since that is in your discretion.

Thomas R. Acevedo
For the Field Solicitor

Enclosures

cc:
Superintendent, Fort Peck Agency, Poplar, MT

THE LAW OFFICES OF
John J. (Jack) McNamara
10830 WILSHIRE BLVD., SUITE 800
LOS ANGELES, CALIFORNIA 90024
(213) 475-4933

RECEIVED
SEP 22 '81
LEGAL DEPARTMENT

September 18, 1981

ARCO Exploration Co.
P.O. Box 5540
Denver, CO 80217

Attn: Robert N. Specht

File No. 153

Dear Mr. Specht:

I write to you as legal representative of Fourstar Resources, Inc., a Montana corporation, controlled solely by Native Americans. My client has recently been granted the exclusive right to obtain non-competitve oil and gas leases on allotted lands within the Ft. Peck Reservation by the Bureau of Indian Affairs.

As you know, Federal law and BIA regulations (25 C.F.R. Sec. 172.4) require that all oil and gas leases on allotted Indian lands be obtained by competitive bidding to the highest bonus bid offered. This is the first time a waiver of this competitive bidding procedure has been granted to a private firm in such a situation. Fourstar has already assembled a 4,000 acre plus land package in the Ft. Peck area and will have an additional 20 - 25,000 acres under its control in the very near term. Nor are Fourstar's activities limited to the Ft. Peck reservation.

Several Tribal Councils throughout the area are presently considering designating Fourstar as their exclusive agent for oil and gas development on their Tribal lands.

Thus, Fourstar is in a unique position to negotiate development agreements for extensive acreage on several prospects in this prime area. It is seeking a joint venture-type of arrangement for the development of these various oil and gas reserves. Your firm has been selected as a possible candidate for the co-venturing of these developments.

Specifically, Fourstar is seeking an experienced and reliable oil and gas company to explore and develop the Indian lands under its control. At present, this includes lands at Ft. Peck with other reservations to follow. Fourstar is able to secure a land position on these reservations due to the high regard in which it is held by both the various Tribal Councils and the individual allottees.

EXHIBIT C
Statement of Marvin J. Sonosky
Senate Select Committee on Indian Affairs
S. 1894, March 15, 1982

All exploration and development costs must be advanced by the oil firm, with the precise drilling and budgetary commitments to be mutually agreed upon by the venturers in advance. However, an Indian majority in the joint venture will allow for the exemption from the Federal Windfall Profits Tax that is set out in 26 USC Section 4994(6). This section exempts from that tax any production by "an Indian tribe . . . or an Indian Tribal organization." A joint venture with an Indian majority in terms of equity should qualify for this exemption. There are also legal precedent in several states for such an entity's being exempt from state and local taxes.

All intangible drilling costs, depletion allowances, dry hole allowances, depreciation deductions and investment tax credits will, of course, be allocated to the oil firm side of any joint venture. In addition, all costs advanced by the oil firm could be recoupable prior to initiating any split of gross revenues.

In order to assuage the fears of its clients and to insure the orderly development of their lands, Fourstar must act as the on-site operator and have a voice in all decisions as to prospects to be drilled, hiring of employees, etc.

While all these terms are open to reasonable negotiation, the basic tenets of the foregoing will be required by Fourstar in order to assure its clients of an equitable share in the revenues that may accrue from the development of their resources, as well as to safeguard the trust which they have placed in Fourstar.

I look forward to hearing from you regarding this proposal.

Sincerely,

John J. (Jack) McNamara
Attorney at Law

/ac

cc: Fourstar Resources, Inc.

EXHIBIT C
Statement of Marvin J. Sonosky
Senate Select Committee on Indian Affairs
S. 1894--March 15, 1982

Senator MELCHER. Our next witness is John Gidley, vice president, Fourstar Resources, Billings, Mont.

STATEMENT OF JOHN GIDLEY, VICE PRESIDENT, FOURSTAR RESOURCES, BILLINGS, MONT.

Mr. GIDLEY. Good afternoon, Mr. Chairman.

I would first like to state that I am the individual that was referred to by Mr. Sonosky. I am torn between what is best for my company and what is best for the Indian people. In my own mind, I would just as soon shutdown my own oil leasing business for the protection of the people because what this bill is going to do is going to just open up the reservations which are unprepared. I, myself, am college educated, but I do not feel that I have the knowledge to even deal with the oil companies. I will be very brief with my presentation. I just feel that a few points can be made concerning how this bill, S. 1894 might affect the Indian landowners since the waiver I was issued on August 17, 1981, has fundamentally allowed Fourstar Resources, Inc. to operate under the same principle as would be established by S. 1894.

Speaking first on behalf of the Indian landowners, I must express my concern over the fact that the Bureau of Indian Affairs and the USGS are not presently staffed to carry the additional workload that the passage of this bill would give these agencies.

On the Fort Peck Reservation alone there are still hundreds of unreviewed leases dating back to a sale held 3 years ago.

Due to the excessive burden that these two agencies are presently operating under, I took some time to approach each agency to try to make a determination on how the additional increase of leases could be handled.

On March 4, 1982, I met with an individual from the USGS and with an individual from the Bureau of Indian Affairs for a lengthy discussion on what the passage of this bill would mean to each agency. During our meeting, I was given a copy of an Interior memorandum dated June 23, 1976. Since very few changes had been made within either agency, I am including an excerpt from this memorandum in this report.

This memorandum is to the Commissioner of Indian Affairs from the Director of Geological Survey and states and I quote:

> Review of the problems inherent in the negotiation of oil and gas agreements convinces us that proper handling of these agreements will require the establishment of a separate organizational entity within either the Bureau of Indian Affairs or the Geological Survey. Such an organizational entity would be designed through staffing and budgeting procedures to provide the services that the Indian tribes require for intelligent evaluation of proposals beginning with the preliminary stages of negotiation through the implementation of the agreement.
>
> The staff should include technical experts with supporting disciplines such as economics, contracting, legal, geological, geophysical, engineering and accounting to assure the proper negotiation, interpretation and implementation of each such agreement.
>
> The geological survey is not presently staffed or funded to properly assist in the negotiation, or to service completely those oil and gas agreements now being negotiated pursuant to 25 USC 396B.
>
> Accordingly, the proposed amendments specifically provides that the supervisor is not authorized or empowered to monitor, account for, collect or distribute funds resulting from profit-sharing provisions contained in an oil and gas agreement,

nor to enforce those contract provisions relating to performance that exceeds the requirements contained in 25 CFR 171 and Chapter 2 of Title XXX of the Code of Federal Regulations.

Now, again, speaking on behalf of the landowners, I feel it is my responsibility to inform the prestigious members of this committee that we, the Indian people, myself included, need the protection of a special agency empowered to assist us in the negotiations and monitoring of oil and gas lease agreements.

I personally have witnessed the power and shrewdness of the oil industry and without an agency specifically established to protect the Indian interest, I fear that we would be unleashing a pack of wolves on a helpless herd of sheep. I do not by any means want to be misinterpreted as implying that the Indian people are unintelligent. I merely wish to go on record stating that they are presently inexperienced in negotiating their own lease agreements.

On Fort Peck alone, there are many examples of Indians being approached in bars by oil companies while they were completely inebrieted and offered ridiculously low sums of money such as $2 to $500 to sign leases. Even those leases are reviewed by the local agency, many times such leases have been processed and approved.

From the viewpoint of the petroleum industry, I have gathered opinions from conversations with Gulf, Murphy Minerals, Kennedy & Mitchell, and number of independent oil companies and found them all to be in agreement that such a bill as this would definitely be a boon to the industry.

Being a member of the industry myself, I would have to agree. If the Indian people were allowed to negotiate their own lease agreements without an agency established to interpret and evaluate the pending contracts, the legal departments of the oil industry would have a field day using contractual language with dual meanings.

I do not mean to cast aspersions against all oil companies, but it has been my personal experience to be faced with contractual loopholes that my own inexperience allowed me not to recognize.

Now, speaking as one of the owners of a company that has been empowered to negotiate leases on a lot of Indian lands, I will be perfectly honest at the risk of destroying my own business. In the beginning, I had several meetings with Mr. Dorn Steele, the superintendent of the Fort Peck agency in Poplar, Mont. My contention at that time was that I felt that I could get a better deal on my families' 3,000-plus acres if I negotiated an oil and gas lease rather than accept whatever bid during the semiannual oil and gas lease sale was offered; so, I approached the Billings area director's office and then went on to Washington to see if my idea could actually be accepted.

While in Washington, I found that a waiver of title XXV, section 172.4 could be achieved, but by policy had to be obtained by a corporation rather than an individual. Hence, Fourstar Resources, Inc., was born and I found myself in business with three other enrolled Indians with a waiver that allowed us to negotiate leases on allotted lands within the confines of the borders of the Fort Peck Reservation.

Working hand in hand with the realty office of the Billings regional office of the Bureau of Indian Affairs, I then set out to locate. oil companies that would be willing to sit down and negotiate leases on Indian lands. Our first contracting company was Kennedy & Mitchell from Denver, Colo.

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On October 28, 1981, we signed an agreement with said Kennedy & Mitchell that increased the base royalty rate paid to the allottees from 16⅔ percent which the BIA was offering to a minimum of 20 percent, and a bonus per acre payment equivalent to what surrounding acreage went for on the last sale.

My original intention, when I acquired the waiver, was to go to the landowners and discuss their terms first. Then go to the industry and try to negotiate a lease that could be acceptable to both parties. Our fee for this is $10 per acre and a 2-percent overriding royalty charged to the oil company.

During my negotiations with Kennedy & Mitchell, as president of Fourstar Resources, I made it quite clear that our agreement was not exclusive with them. Our purpose was to try to get the best deal for the landowner, not for the oil industry.

While being in the field negotiating leases with these landowners, two of my three equal partners sold their 25 percent to the remaining individual and then entered into a verbal exclusive agreement with Kennedy & Mitchell.

To make my point of how money can change the best of intentions, Norman Hollow, who is the tribal chairman of the Fort Peck Reservation raised the base minimum royalty for the tribal lands to 25 percent. Even though the purpose of Fourstar is to get the best deal for the allottee, we as Fourstar, continue to negotiate for oil companies at 20 percent. Though I admit that it was through my efforts and the the guidance of the Bureau of Indian Affairs at all levels, I must state that our company is in the control of Kennedy & Mitchell exclusively, and since I am only a 25 percent shareholder, I am powerless to stop either company.

Presently, I am applying for another waiver that will keep all deals negotiated under the watchful eye of the area director's office, and I hope to go into competition with Fourstar Resources and get the people a better deal.

Thank you.

Senator MELCHER. How many acres are involved in Fourstar Resources on Fort Peck?

Mr. GIDLEY. We have access—the entire reservation is 2.2 million acres. Of that, 50 percent of it is in fee, and of the 50 percent remaining of the 1 million acres, approximately 35 percent is under lease, and the rest of it is available to Fourstar.

Senator MELCHER. How much is under lease to Fourstar?

Mr. GIDLEY. Fourstar actually only has three approved leases at the present time. We have 13 submitted, and they range in size from 40 acre tracts to the largest size, which is a 320; so, totally it is around, I would say, 1,500 acres.

I personally have a completed lease on my own family's land, which is for 3,000 acres, but I have not found an oil company yet that would meet our terms. Gulf is presently reviewing it.

Our purpose, when we established this company, when I first came to Washington, was merely to get the authority to negotiate my own family's lease, not to go into the business, but with the Indian Self-Determination Act, Tommy Riggs and Tim Vollman both assisted me in putting this together so that we could actually go in to people, not seek them out. Let them seek us out, and tell us what kind of deal they wanted. If they wanted 25 percent royalty; then, that is exactly

what we told the oil companies. That letter which was mentioned, that was sent out—was not sent out by my company. It was not authorized by my company. It was sent out by Jack McNamara, who is an oil and gas attorney out of Los Angeles, Calif., who really had nothing to do with us. He was a freind of one of the members of the board and put the letter together and mailed it out without any authorization. We did send a follow-up letter rescinding everything that was in that letter under the direction of Mr. Saltmarsh who is in the Bureau of Indian Affairs Office in Billings.

Senator MELCHER. How much production is there now on the Fort Peck Reservation?

Mr. GIDLEY. I do not have the exact figures, but it is growing. It is increasing rapidly. This new Sun well that came in has really rekindled the interest in the reservation, and the oil companies now are really pounding on our door trying to get us to make some type of agreement, but as I have stated, Larry Smith, who is my partner in the company, owns 75 percent now by having bought out the other two members, and he has gone into an exclusive agreement with Kennedy & Mitchell and I cannot do anything about it, and they are offering less money than what the BIA is even offering now.

Senator MELCHER. Well, though they are offering less money, do I understand you correctly, Fourstar Resources has negotiated leases on 1,500 acres on the reservation?

Mr. GIDLEY. Yes, and all 1,500 acres were done at a better deal, a higher royalty rate and a higher bonus per acre payment than they were giving on the sale.

Senator MELCHER. Is or is not higher than those under competitive leases?

Mr. GIDLEY. It is.

Senator MELCHER. It is?

Mr. GIDLEY. Yes, but after this past sale when they raised the royalty rate to 25 percent, Fourstar is still making the leases at 20 percent, on a sliding scale 20 to 25 percent according to production.

Senator MELCHER. What is the length of term for the lease?

Mr. GIDLEY. Five-year lease.

Senator MELCHER. Well, your point is not so much opposition to the bill itself, or its provisions for opportunities for joint ventures, as much as it is your belief that there is not enough expertise available for Indian tribes to make any kind of a deal; is that it?

Mr. GIDLEY. There really is not. At the present time there is not. I have been called in myself at Fort Peck, after Mr. Sonosky left, to discuss what he had discussed with the council, and a lot of the things that he had discussed with them, they were not even in full understanding of, but that seems to be a habit on that particular reservation. It is my reservation. I was born there and I am enrolled there, but I have found that the majority of the things that are presented to that particular council, if they are not understood, it is tabled and just left, and they—I guess it is a matter of pride. They have too much pride to ask questions when they do not understand.

Senator MELCHER. Thank you very much, John.

Mr. GIDLEY. Thank you, sir.

Senator MELCHER. The attachment to your statement will be made part of the record at this point.

[The attachment follows:]

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

WASHINGTON, D.C. 20245

IN REPLY REFER TO:

RECEIVED
AUG 21 1981
(BA)

Memorandum

AUG 17 1981

To: Billings Area Director

From: Acting Deputy Assistant Secretary - Indian Affairs (Operations)

Subject: Waiver of 25 CFR 172.4

The Bureau has been approached by Fourstar Resources, Inc., a Montana chartered corporation which is wholly owned by enrolled Indians of the Fort Peck and Fort Berthold Reservations. Fourstar Resources proposes to lease allotted Indian lands on the Fort Peck Reservation for the exploration and development of oil and gas reserves.

Although no formal proposal has been submitted, the concept as explained by Mr. John Gidley, one of the owners of Fourstar Resources, is as follows. Fourstar will obtain allotted land leases and contract for the development thereof. The landowners' royalty will be no less than twenty-five percent and will range upward to possibly forty percent depending on development expense payments. The responsibility for satisfaction of debt service and/or development expenses shall be solely assumed by Fourstar and paid by sale of production.

This is the first time such an endeavor has been undertaken and in the interest of fostering the policy of Indian self-determination, this office feels the concept proposed by Fourstar Resources should be supported. In this light, it is recognized that a fledgling corporation such as Fourstar Resources is ill-equipped financially to compete with established oil and gas industry members in the process of competitive bidding for allotted Indian oil and gas leases. Therefore, pursuant to the recommendations of the Superintendent, Fort Peck Agency, and concurrence therein by the Billings Area Director, the competitive bidding requirements contained in 25 CFR 172.4 are hereby waived for purposes of assisting Fourstar Resources, Inc., and only Fourstar Resources, Inc., at this time, in obtaining oil and gas leases on allotted Indian lands of the Fort Peck Reservation.

Lest the foregoing waiver be taken lightly and out of context, we wish to strongly emphasize the following points:

1. It is recognized that the lease language for this new type procedure has not yet been finalized and approved. This waiver is not intended to anticipate either blessing or approval of any such lease. That remains within the sound discretion of the Area Director when the question is asked, "Is it in the best interest of the Indian landowners involved?" In other words, if the Area Director finds that an Indian landowner could obtain a substantially higher return from his oil and gas resources by submitting the tract to a competitive bid sale, he continues to have the discretionary authority to order such a competitive bid and disapprove any lease with Fourstar Resources, Inc.

2. This waiver is not intended to give Fourstar Resources, Inc., a so-called "blank check." However, it is intended to be a step forward in Indian self-determination by removing an obstacle to the development of Indian owned resources by Indians..

3. Indians must be given the opportunity to make more decisions in the management and development of their resources. We therefore feel that pending enactment of legislation authorizing negotiated agreements, this waiver is fully justified.

4. All allottees should be adequately counseled by the Superintendent so as to have the proposed development plan fully explained in detail. All counseling sessions should be documented thoroughly as to persons in attendance and topics discussed. Complete transcripts should be retained, if possible.

5. All landowners, if they desire, must sign leases as to their own retained interest.

6. Due to the deep involvement of USGS in the operational supervision and royalty accounting on Indian lands, representatives of that agency should be fully involved in this proposed development.

If we can be of additional assistance in this matter, please advise.

Kenneth L. Payton

Senator MELCHER. Robert Billie, Navajo Tribal Council. Are you a delegate from the tribal council?

Mr. BILLIE. Yes, sir.

STATEMENT OF ROBERT BILLIE, NAVAJO TRIBAL COUNCIL DELEGATE, ANETH, UTAH

Mr. BILLIE. Mr. Chairman, I want to thank you for the time in providing me the opportunity to deliver this statement on behalf of the Navajo Nation.

The purpose of my testimony is to express the strong support of the Navajo Tribal Council enactment of Senate bill 1894. The sentiment of the Navajo Tribal Council is expressed in a resolution which was unanimously approved by the council on February 5, 1982, and is appended to my statement.

Presently, the role of Indian tribes relating to the development of energy and mineral resources is limited to leasing-type arrangements. The effect of this limitation is to unduly restrict tribal autonomy and inhibit tribal incentive to spur development of resources on reservations.

A number of Indian Nations have been blessed with abundant energy resources. Unfortunately, in many cases these resources have been squandered by agreeing unknowingly to unfair leases. As we all know, the Bureau of Indian Affairs, as our trustee, has been a part of this giveaway program. Today, many Indian national governments are stable, responsible and sophisticated to a point that we can best determine how to utilize the remaining resources on our lands to receive maximum returns.

The current limitation on the development of reservation energy resources to traditional leasing arrangements was created in the Omnibus Indian Mineral Leasing Act of 1938. This law discourages the extraction of resources located on Indian lands by preventing Indian tribes from realizing the maximum economic and social benefits which would ordinarily flow from the development of energy resources.

S. 1894 will enable tribes to determine what form of development arrangement is in their own interest and to empower tribes to negotiate directly with prospective developers in the same manner as other mineral owners. The effect of this will be twofold. First, the tribes will be in a better position to enhance their own economic self-sufficiency, thereby contributing to greater sovereignty with a corresponding lessening of a dependency on Federal expenditures for services which tribes will then be able to provide for themselves. Second, enactment of this bill will contribute to the achievement of national domestic energy self-sufficiency by encouraging the development of tribal energy and mineral resources.

The financial remuneration which might result through more flexible agreements with respect to energy development would be our aspiration to move toward greater vertical integration on energy projects, thereby resulting in an increased transference by both management and technological expertise to the Navajo people. By utilizing Navajo preference, we would hope to increase opportunities for Navajos in both employment and business, thereby contributing to development of a strong, vibrant private sector on the reservation. This, we believe,

is consistent with the goals and aspirations articulated by the Reagan administration.

Gentlemen, I am now available for questions. The remainder of my written statement is offered for the record.

In the last decade, the Navajo Nation has upgraded its internal capacity to plan, evaluate and develop various energy projects. These projects are more favorable in providing overall positive economic return to the Navajo people. No longer is the Navajo Tribe satisfied with the old standard Federal leases, which only emphasized and relied on royalty return. New concepts which could be formalized will address alternate forms of agreements keyed to assumption of control and efficient development of its energy resources.

In discussing maximum returns, we are looking toward a concept known as vertical integration in energy projects, where transference of management and technological expertise to the Navajo people can be a reality. Preference in Navajo employment and business opportunities can be realized, and strong Navajo economic development could be the result.

To achieve the goals which we have set for ourselves, the Navajo Tribal Council adopted the Navajo national energy policy, in development and its social impact, between the future and our current needs, and between energy needs of the Navajo Nation and our neighbors.

To carry out the development policy, the Navajo Energy Development Authority was so created by the Navajo Tribal Council in May 1980. The express purpose of NEDA is to be a development organization of the Navajo tribal government. However, NEDA cannot function under the present leasing-only policy promoted by the Bureau of Indian Affairs.

NEDA must be afforded the opportunity to enter into joint ventures, partnerships, joint production, risk services, management and operating agreements to achieve their goals.

In conclusion, I would like to thank you for this opportunity to testify and urge you to support S. 1894.

Senator MELCHER. Thank you, Robert.

I notice in part of your statement submitted for the record you mention that the Navajo Energy Development Authority created in May of 1980 feels constrained by the present leasing-only policy. I assume that not only the tribal council but the Navajo Energy Development Authority has also examined the bill and concurs in all this testimony?

Mr. BILLIE. Yes, sir.

Senator MELCHER. Thank you very much.

Mr. BILLIE. I thank you, Mr. Chairman.

Senator MELCHER. The resolution will be inserted in the record at this point.

[The resolution follows:]

CF-9-82
Class "C" Resolution
No BIA Action Required.

RESOLUTION OF THE
NAVAJO TRIBAL COUNCIL

Supporting the Senate Bill 1894, Entitled
"Alternate Forms of Agreements for Indian
Tribal Minerals Development"

WHEREAS:

1. The present legislation limiting development of energy and mineral resources located on Indian lands to leasing only unduly restricts tribal autonomy and does not provide sufficient incentives to spur development of such resources; and

2. Legislative reform of the present system enabling the tribes, as mineral owners, to determine the form of development arrangement which is in their own best interest and empowering them to negotiate directly with developers in the same manner as do all other resource owners both enhances the economic and social conditions of the tribes and aids in the achievement of domestic energy self-sufficiency by encouraging development of tribal energy and mineral resources; and

3. The enactment of Senate Bill No. 1894, which was introduced on November 30, 1981, by Senator John Melcher of Montana would remedy the limitations inherent in the present system and promote both tribal autonomy and the development of Indian resources; and

4. The present legislative regime limiting development of energy resources on tribal lands to traditional lease arrangements, entered into pursuant to the Omnibus Indian Mineral Leasing Act of 1938, discourages desired investment in the resources located on Indian lands and thus prevents Indian tribes from realizing the maximum economic and social benefits which would ordinarily flow from the development of such resources; and

5. This continuing restriction to the disposition of mineral interests solely by lease is, today, inconsistent with both recent developments in the energy and mineral sectors and with the concept of tribal autonomy. Such concept requires that the tribes be offered the same opportunities to exercise significant options in management, profit, capital, resource and risk participation as are available to all other mineral owners; and

6. Excessive regulation under the present system inhibits energy and mineral development on tribal lands because of the high transactional costs associated with the obtaining of mineral rights

to Indian lands. As a consequence, tribal energy resources are underutilized to the detriment of both tribal and national economic and energy goals. Only by allowing increased flexibility for both the tribes and the private sector to negotiate the types of modern, innovative agreements that are in their mutual interests can production from tribal lands be maximized with a minimum of social disruption to the tribes; and

7. Innovative energy development arrangements, including joint ventures, operating agreements, risk service agreements and managerial agreements, which provide for carried working, net profits or other interests would be permitted under S. 1894 and would provide Indian tribes a greater participation in the profits derived from their benefit through a greater assurance of access to resources; and

8. Prompt legislative action is needed to provide the Secretary of the Interior clear authority to consider the non-traditional agreements which are now pending or under negotiation and to ratify those non-traditional agreements which have heretofore been concluded; and

9. Subject only to modest changes to ensure more fully, (1) direct tribal involvement in negotiating the type of agreement that is in each tribe's best interests, and (2) a smoother transition from the 1938 Act lease limitations to a broader negotiating authority, S. 1894 would provide the vehicle necessary to permit the negotiation of innovative energy agreements. It thus has the full support of both Indian tribes and the private sector. Its enactment is critical to ensure a vitally-needed nationwide development of energy and mineral resources located on Indian lands.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Navajo Tribal Council strongly supports U.S. Senate Bill S. 1894 and urges the Congress, and particularly its individual members who represent the various Indian Nations, to enact the measure without delay for the detailed reasons listed above.

2. The Navajo Tribal Council strongly requests that the Bureau of Indian Affairs and the Department of the Interior to fully support U.S. Senate Bill, S. 1894.

3. The Navajo Tribal Council authorizes the Chairman, Navajo Tribal Council, to do all things necessary and legal to ensure the enactment of U.S. Senate Bill, S. 1894.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 54 in favor and 0 opposed, this 5th day of February, 1982.

Chairman
Navajo Tribal Council

Senator MELCHER. Our last witness is Newton Lamar, president, Wichita and Affiliated Tribes, Anadarko, Okla.

STATEMENT OF NEWTON LAMAR, PRESIDENT, WICHITA AND AFFILIATED TRIBES, ANADARKO, OKLA.

Mr. LAMAR. Mr. Chairman, as president of the Wichita and Affiliated Tribes of the Anadarko Agency in western Oklahoma, I thank you for this opportunity to present the tribes' views on S. 1894. We support the provisions of the bill which would affect tribal lands and tribal lands only. However, we believe that individuals require more protection than the bill presently provides.

Within the jurisdiction of the Anadarko Indian Agency, there are three tribes, the Wichita and Affiliated Tribes, the Caddos and the Delawares. There is little tribal land. However, members of all three tribes have allotments very valuable for oil and gas development. Some of the most valuable lands are owned by original allottees who were granted their trust patents at the turn of the century.

During the last few years the value of these allotted lands, particularly the deep gas reserves, has soared. There have been numerous discoveries of gas at around and below 15,000 feet and the area is experiencing all the problems, as well as the benefits which go with a full-scale oil boom.

Vast sums of money are involved, often as much as $1 million for a single 160-acre tract. Our members, who are unsophisticated in oil and gas development, have become prey to a variety of sharp practices which have resulted in the loss literally of millions of dollars.

The BIA has largely failed in its obligation to protect these people and has, indeed, created an opportunity for many of the abuses which have resulted in multimillion dollar losses to our people. In many instances, the Bureau of Indian Affairs' employees act more like representatives of the oil companies than they do of the trustee of the Indians.

On numerous occasions, for example, Bureau employees with affiliations to oil companies have solicited unsuspecting allottees to agree to extensions of leases which are about to expire. Since the original lease would have been granted at a very low bonus and the new lease might bring as much as $15,000 per acre, the savings to the oil companies and the detriment to the allottee are obvious.

Even when the Bureau tries to do something right, it does not receive support from other essential Government agencies and the result is a dismal failure. In one case, the oil companies took the Bureau of Indian Affairs to court because the Bureau changed its communitization form in favor of the Indian allottees.

In that case, *Sanquine Ltd.* v. *Department of the Interior*, the U.S. attorney refused to defend the Bureau's position and since neither the Bureau nor the Department of Justice notified the allottees of the case, the allottees' land was given away without their even knowing about it.

When they tried to intervene, the United States opposed them and they have had to appeal to the 10th circuit where the case is now pending.

Worse yet, the Bureau issued an order applying the settlement of this case to all the leases in the Anadarko area with the result that millions of dollars worth of allottees' lands have been put under communitization agreements against their wishes and their best interest and often contrary to the terms of the leases.

Because of the sharp dealings on the part of the oil companies and the frequent collusion with the BIA, we do not trust the BIA to have the unrestricted approval power over individuals' lands. Individual Indians do not have the sophistication or the resources to find out all the facts and negotiate on an equal footing with the companies. Therefore, if S. 1894 is passed in its present form, it will be an invitation for the companies to take advantage of the allottees. For these reasons, we suggest that this bill be amended to require that allotted lands be first offered for competitive bid prior to any negotiations.

This is consistent with the current law and it would protect the allottees by at least giving them an idea of what the market value of their land is.

Further, we would like the bill to be amended to require that prior to any disposition of Indian lands or the creation of any interest in that land, the Secretary of the Interior will give the Indians affected at least 30 days notice of the proposed action. This would help prevent the kind of thing that went on in the *Sanquine Case* and has gone on in so many other cases of forced communitization in our area.

Finally, I would like to comment on a few of the technical provisions of the bill, primarily, the time limits for Secretarial action. In oil and gas leasing, which is the primary concern of our tribes, it would be harmful to allow the Secretary 1 year to make a determination of whether a negotiated deal should be approved. Oil and gas leasing does not constitute major Federal action for which environmental impact statements need be filed. Therefore, there is no reason why the Secretary could not make his determination in 90 days. Providing 1 year for the Secretary to act will not increase the kind of substantive review which he gives to the case. It will merely take longer to get each approval, since the Bureau of Indian Affairs invariably takes the maximum amount of time allowed by law to do anything. Therefore, we think that secretarial approval should be required in 90 days unless the action is such that an environmental impact statement must be filed. In that case, 6 months is a reasonable period.

I would like to elaborate on a few instances that I have mentioned. A speculator came to me. There was a lady who had 160 acres in a fairly hot area. Prior to the sale, he wanted me to convince her that she should sign an agreement with him for $4,000 an acre and offered me a sum of money if I could secure such an agreement from her.

I told him I was not interested. That her land would go up for sale at the scheduled auction, and I told him the agreement would not be any good anyway because of the provision that this land had to be advertised. He said that with that agreement, he could create some problems for her, at least, which would probably require her to go ahead and sign with him.

But at the subsequent sale, she got $2,100,000 for that 160 acres.

Another one, a lady was given $368,000 at a scheduled sale. When they tried to firm up the lease, they found that the place was already

under lease to a company and it would not expire for 6 months. At the expiration of that lease, the place was put up for the second time, and at the second sale, she got $1,124,000 for 160 acres. But as a result of the first sale, she was quite disturbed that she couldn't formalize the lease which would have given her the $368,000.

So, you see, we have never had dealings with oil companies, and I do not consider myself a dumb person, but there is a lot I do not know about it myself. I have been hassling the Bureau for 2 or 3 years now on these very problems dealing with communitization, and, as Mr. Sonosky said, you have a horde of people down there that know how to manage the system and I am speaking primarily of a former Bureau solicitor who resigned and went to work for an oil company. Two superintendents now have their own brokerage firms with about eight people that I know of, who were former realty people with the BIA, now working with them. These people know all of the loopholes. They know how to get around certain regulations. They recognize the weaknesses in the delivery system of the Bureau. They know how tribes operate and they are able to get these kinds of things done.

I might add that there are three former chairman that are doing the same thing. It has become a situation where we are up practically night and day trying to keep an eye on what is going on around here. I feel that if individual allotments are allowed to go up without first having a scheduled sealed bid and going into oral auction, then I think we are going to be in trouble down there. Not only the Indian people, non-Indians in the area are in the same situation that the Indian people are in. In fact, they are in a worse situation. They rely on the oil and gas sales to gain information so that they, at least, know what their lands are worth as well. If they own maybe a quarter section in a section which is all Indian owned, Indians get—I think the highest bonus so far has been $15,800 an acre. Well, he knows at least what his land should be worth also and the oil companies object to this. They are saying that leases are going too high and that is because it is all above board. Everybody can see what their neighbor is getting; so, naturally they want the same thing.

There are probably a lot of things that I have failed to discuss here but at the end of my prepared testimony you will see that there has been an invitation or resolution passed by 23 tribes asking for an on-site congressional investigation dealing with allotted lands, and we invite you to Anadarko. We would tell you that every rule in the book has been broken there and we can supply documented evidence.

I would like to close by saying that we appreciate the opportunity to comment on this important legislation and we hope that the committee will be investigating and suggesting legislation in other areas of mineral development on Indian lands.

The problems I have outlined are not unique to the Wichita. Things are the same all over western Oklahoma. I am submitting, with the written copy of my remarks, a point resolution of 23 United Tribes of Western Oklahoma and Kansas describing these problems and asking the Bureau to take action regarding them.

On behalf of the united tribes, I would like to invite the committee to come to Oklahoma to investigate the shocking losses to unsophisticated individual Indians which have occurred in recent years from the actions of the oil companies and the Bureau of Indian Affairs.

In closing, I might add that, myself included, have suffered a great loss at the hands of the Bureau.

I had a lease that was about to expire. They immediately allowed a company to come on there and communitize my property, along with my mothers, and we lost a potential $3 million, and that is according to what the land across the road brought at a scheduled auction. But, these kinds of things are happening everyday. I fully agree with the things that Mr. Sonosky brought up earlier.

With that, I will conclude my statement.

Senator MELCHER. Mr. Lamar, does the joint resolution of the United Tribes of Western Oklahoma and Kansas direct itself to events that have occurred in the past 3 or 4 years, or does it go back for a longer period of time?

Mr. LAMAR. This all started, Mr. Chairman, when the President deregulated oil and gas below 15,000. The problem arose where oil companies had secured leases on a commodity that was appraised at $25 an acre. When the deregulation came, I think the one thing that the President should have said, "on all new leases."

All leases that were bought for maybe $100 an acre, as I say, suddenly became worth $7,000 and $8,000. Speculators were trading them back and forth selling to oil companies. Farm out assignments. All of these types of things were taking place, yet the landowners got nothing. Of course, that is an issue that we had no control over. I am sure maybe the President did not realize what he was doing when he deregulated, but he should have made it on all new leases.

Suddenly, those leases that were already in effect, some of them were due to expire in short periods of time. There were not enough rigs to go around. Oil companies were coming in and setting up rat hole rigs. One I know, in particular, was drilling there for 30 days. I went out and asked him, "What are you doing here?" He said, "Holding a lease." At the end of the 30 days, they even supplied a drilling report showing they had drilled 36 feet, but when they brought the new rig in, the big rig which they finally obtained, they put it in a different location. By doing that, they should have automatically lost their lease right there because all that area had already—the leases had already expired.

I reported this to the Bureau. They said, "Gosh, we missed that one." They missed about $3 million for the landowners is what they missed.

Senator MELCHER. You would help this committee immensely if you had knowledge of any Indian lease that ever had been canceled.

Mr. LAMAR. No, sir. I myself have personally reported—the regulations call for assignments to be approved 30 days after assignments are made. Never are these assignments ever approved by the Bureau of Indian Affairs, much less do they ever get in the file. But since we raised the question, I tried to cancel my own personal lease because there were no assignments filed in that lease. We leased to Shell, suddenly, we are dealing with Moncrief and Walsh out of Fort Worth. We did not know them at all. They said, "Well, we own an interest," and I am sure they paid a pretty good price for that interest.

I reported the fact that they had not supplied or approved an assignment, thereby, I was requesting that my lease be canceled.

Suddenly, the assignment showed up at the Bureau, which was way beyond the 30 days. I was told by a Bureau employee that really they had supplied the assignment, but somehow they got lost, but they had found them after this came up, several months later. They found them; so, that is why they let the company go ahead and supply the new assignments that they had made. I said, "Well, show me a copy of the old assignment." They said, "Well, we did not need them so we sent them back to the company."

But it is this type of attitude that has prevailed there, and it just seems as if though our trustee is working as a trustee for the oil company. I believe, if you allow allotted land to go up for leases without competitive bids and oral auctions, then our people are going to lose their shirts. I have had old people tell me they even opened their blinds in the morning and here is a guy from the oil company standing there. They hassle them; harass them. Some of them actually go into hiding when they have a piece of land that is not leased. If this is allowed, then, you know, they are going to get to them.

There are people in our own tribe who, for money, would help the oil companies get to those people.

Senator MELCHER. Well, if I understand you correctly, you believe that the competitive bidding aspects of leasing are the protection for individual allottees?

Mr. LAMAR. At least they all know what their neighbors are getting for the surrounding area, and they at least know what they should be getting.

Senator MELCHER. Beyond that, you would recommend expert advice be available to the allottee?

Mr. LAMAR. Yes, first off, I would recommend that they be stricken from this bill and only approved for tribes.

Senator MELCHER. Only for tribes themselves?

Mr. LAMAR. If we could prevail on your committee to hold onsite investigations in Anadarko you would see exactly what I am talking about, and then make a decision on allottees.

Senator MELCHER. Do I understand you correctly that the competitive bidding for allottee's minerals would still be held under the requirements of the 1938 Indian Mineral Leasing Act?

Mr. LAMAR. Yes.

Senator MELCHER. Thank you very much.

Mr. LAMAR. Thank you.

Senator MELCHER. Mr. Lamar, we will ask you for the names of those employees of the BIA.

Mr. LAMAR. I will supply them.

Senator MELCHER. They would, from your testimony, appear to be in conflict of interest.

Mr. LAMAR. In fact, I might add that one of the superintendents on his business card said, "Superintendent, Bureau of Indian Affairs," with very little letters, "retired."

Senator MELCHER. Well, that employee is a former employee, however?

Mr. LAMAR. Retired, yes.

Senator MELCHER. We need to know any current employee who might be involved.

Mr. LAMAR. Yes, but I would think that there would be a conflict also for former employees to retire from the Bureau and come right back and use all the information that they have gained by having been employed with the Bureau and going into business working with the same type of activities they were involved in with the Bureau.

Senator MELCHER. We will check the Federal law on it. I believe they are restricted for only a 1-year period of time.

Mr. LAMAR. Well these people go from one day they are working for the Bureau; the next day they have their own private company. There is no year or anything else involved.

Senator MELCHER. Well, we will need to know the names and we will need to investigate rather thoroughly whether they are in violation of the law. We appreciate your bringing that to our attention.

Mr. LAMAR. Yes. I am in constant contact with your subcommittee in regards to the problems we have had in Oklahoma, and I will supply that information. They know how to get ahold of me anytime they wish to do so.

Senator MELCHER. We will get ahold of you before you leave the room today.

Mr. LAMAR. OK. [Laughter.]

Senator MELCHER. Thank you again, Mr. Lamar. The resolutions accompanying your statement will be made part of the record at this point.

[The resolutions follow:]

UNITED INDIAN TRIBES OF
WESTERN OKLAHOMA AND KANSAS
4010 NORTH LINCOLN SUITE 200
OKLAHOMA CITY, OKLAHOMA 73105
Phone (405) 424-1483 or (405) 424-1484

Absentee Shawnee
Apache
Caddo
Cheyenne-Arapaho
Citizen Band Potawatomi
Comanche
Delaware
Ft. Sill Apache
Iowa of Kansas
Iowa of Oklahoma
Kaw

Kickapoo of Kansas
Kickapoo of Oklahoma
Kiowa
Otoe-Missouria
Pawnee
Ponca
Prairie Band Potawatomi
Sac & Fox of Missouri
Sac & Fox of Oklahoma
Tonkawa
Wichita

Resolution No. 82-7

A RESOLUTION DULY ADOPTED BY THE UNITED INDIAN TRIBES OF WESTERN OKLAHOMA AND KANSAS REQUESTING AN ON-SITE CONGRESSIONAL INVESTIGATION OF OIL AND GAS LEASE ACTIVITIES IN THE ANADARKO AREA.

WHEREAS, The United Indian Tribes of Western Oklahoma and Kansas feel there is no consistent pattern of operations by U.S.G.S. and the Bureau of Indian Affairs regarding oil and gas leases, and due to the numerous problems which have arisen in the areas of conflict of interest, illegal communitization agreements, illegal extension of oil and gas leases, activities which are not protecting the contents of the leases, and due to the loss to our Tribes within the past year of an estimated sixty to eighty million dollars due to the performance, or lack of performance, of the Bureau of Indian Affairs and the U.S.G.S., the above activities clearly indicate we need an On-Site Congressional Investigation.

NOW THEREFORE BE IT RESOLVED that the United Indian Tribes of Western Oklahoma and Kansas request an immediate On-Site Congressional Investigation of the oil and gas lease activities of the Anadarko Area.

- CERTIFICATION -

I, Newton Lamar, President of the United Indian Tribes of Western Oklahoma and Kansas, do hereby certify and affirm this resolution to be the action taken by the United Tribes membership during full session on March 11, 1982.

Newton Lamar, President

Attest: E. Raye Smith, Recording Secretary

Resolution No. 82-3

JOINT RESOLUTION OF THE
UNITED TRIBES OF WESTERN OKLAHOMA
AND KANSAS

WHEREAS, the Tribes of western Oklahoma and Kansas and their members possess lands very valuable for minerals, particularly oil and gas;

WHEREAS, these lands are held in trust by the United States which has a fiduciary obligation to manage these lands in the best interests of the Tribes and their members; and

WHEREAS, the Tribes are convinced that the Bureau of Indian Affairs and other government agencies are not acting in the Indians' best interests and have tolerated and even encouraged practices which deprive the Tribes and their members of the maximum benefit from their lands;

THEREFORE, BE IT RESOLVED, that the Tribes petition the United States, their trustee, to fulfill its fiduciary obligations to the Tribes and their members with respect to management of trust mineral lands;

Particularly the Tribes request that the United States:

(1) vigorously enforce conflict of interest laws for federal employees dealing in any way in Indian land;

(2) implement the holding of the recent Tenth Circuit decision in Kenai Oil and Gas v. The Department of the Interior by, among other things, requiring that all communitization agreements be submitted to the BIA at least 60 days prior to the expiration of the first lease in the unit to expire, approving communitization agreements only when in the best interests of the Indians;

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(3) support Indian landholders in litigation arising from the Bureau's management of Indian oil and gas assets; in cases where the United States represents the Indians, the United States should not settle cases or take other significant action in litigation without prior notification to Indian landowners;

Specifically in the case of Sanguine Ltd. v. Department of the Interior pending before the Tenth Circuit, the United States should not oppose the Indians' right to be heard.

Further, the Assistant Secretary of the Interior for Indian Affairs should withdraw the August 18, 1981 directive of Acting Deputy Assistant Secretary Payton applying the adverse settlement in Sanguine Ltd. to all oil and gas leases in the Anadarko Area.

(4) take all necessary action to stop State encroachment in the disposition of Indian oil and gas assets;

(5) inspect leases and ensure compliance with the lease terms and federal regulations, including prompt payment of royalties;

(6) provide funding for tribal programs to develop mineral leasing policies on reservations and to protect and educate individual Indians in the area of mineral leasing;

(7) require that Indian landowners are notified before any disposition of their property is made through communitization, assignment or otherwise; and

(8) take all other action necessary to preserve Indian mineral interests, inform Indian landowners of their rights and involve Tribes in the planning of Indian mineral development and protection of Indian mineral interests.

BE IT FURTHER RESOLVED, that the United Tribes of Western Oklahoma and Kansas request an immediate meeting with the Assistant Secretary of the Interior for Indian Affairs to discuss the pressing problem of mineral development on their lands; and

BE IT FURTHER RESOLVED, that the following tribal leaders are designated as the Tribes' representatives to attend such a meeting and to report back to the Tribes: (Newton Lamar, President - United Indian Tribes).

- CERTIFICATION -

I, Newton Lamar, President of the United Indian Tribes of Western Oklahoma and Kansas, do hereby certify and affirm this resolution to be the action taken by the United Tribes Membership during full session on March 11, 1982.

Newton Lamar, President

Attest: Dan Little Axe, Exec. Director

Senator MELCHER. Before we adjourn, I will submit for the record a letter addressed to Chairman Cohen of this committee from Assistant Secretary Ken Smith; a letter to Chairman Cohen from Amoco Production Co.; and a letter from Wilkinson, Cragun & Barker on behalf of the Salish and Kootenai Tribes.

[The documents follow:]

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Honorable William S. Cohen
Chairman, Select Committee on
Indian Affairs
United States Senate
Washington, D.C. 20510

MAR 15 1982

Dear Mr. Chairman:

This responds to your request for our views on S. 1894, "To permit Indian tribes to enter into certain agreements for the disposition of tribal mineral resources, and for other purposes."

We recommend that the legislation be enacted if amended as suggested herein.

S. 1894 would allow any Indian tribe to enter into any joint venture agreement or other agreement described in the first section of the bill approved by the Secretary of the Interior for the disposition of oil and gas, geothermal, or other mineral resources of tribal lands, or for the sale of production from operations on tribal lands. Such agreements would conform to regulations prescribed by the Secretary. The Secretary would approve any agreement within one year of submission unless the Secretary found that the agreement was not in the best interest of the tribe. Upon disapproval, the Secretary would state his findings in writing within thirty days of his decision. The tribe would then have thirty days in which to file a request for Presidential review of the decision.

S. 1894 would also provide that individual Indians owning trust or restricted minerals within the boundaries of a reservation subject to an agreement entered into pursuant to the Act may join in the agreement with the tribe, subject to Secretarial approval. The Secretary, at his discretion, could also approve joint venture agreements or other agreements for individual Indians owning trust or restricted minerals.

Finally, S. 1894 would ratify, as of its date of enactment, agreements of the types described in the first section that were approved prior to enactment and would provide that enactment of this legislation, would not affect the validity of any lease previously approved or approved after enactment pursuant to the Act of May 11, 1938. It would also direct the Secretary to promulgate rules and regulations to implement the above provisions within 180 days of its enactment.

At the present time, the most frequently used authority for the development of Indian tribal mineral resources is the Omnibus Indian Mineral Leasing Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a et seq.). Section 396a of title 25 permits the leasing of tribal land for mining purposes for a term not to exceed ten years and so long thereafter as minerals are produced in paying quantities. Leases are executed by the tribe subject to the approval of the Secretary. Section 396a requires, in most instances, that oil and gas leases be offered for sale by advertisement followed by competitive bidding.

We believe that the maximum term for leases prescribed by section 396a is undesirable for two reasons. First, with many mining leases, the ten year exploratory period is insufficient for development to begin. Second, the "production in paying quantities" clause, in effect, gives lessees a perpetual lease when minerals are discovered. This latter aspect was identified as a major problem with current leasing practices for tribal lands by the American Indian Policy Review Commission in its Report on Reservation and Resources Development and Protection, Task Force Seven, Final Report to the American Indian Policy Review Commission, 48 (1976).

Experience has shown that the requirement in section 396a of competitive bidding for the leasing of tribal oil and gas does not always work to the advantage of the tribes. Certain tribes which have been able to negotiate oil and gas development agreements appear to have received greater compensation than they had been receiving under competitive bidding. Since the bill does not eliminate the current 1938 Act requirement for competitive bidding procedure for oil and gas development on tribal land before other types of agreements can be made, both tribes and allottees would have the option of negotiation or competitive bidding under the procedures envisioned for implementation of S. 1894. Competitive bidding would continue to be required for most tribal oil and gas leases issued under the authority of the 1938 Act.

The most serious problem with section 396a, however, is that it authorizes development of tribal oil and gas resources only by leasing, ignoring the possibility of joint ventures, joint production agreements, risk service contracts and other non-lease ventures which are commonly used in mineral development today. Such non-lease ventures can provide the vehicle by which tribes can become directly involved in management decisions. The normal lease arrangement merely turns over responsibility for all development decisions to the lessee. The bill would facilitate tribes' direct involvement in such decisions, thereby enabling them to gain management experience and contributing significantly to the goal of self-determination.

Since 1975, the Department has approved a number of non-lease ventures involving the development of mineral resources, pursuant to section 81 of Title 25 (R. S. section 2103). That section requires the approval of the Secretary of the Interior and the Commissioner of Indian Affairs for contracts for services relative to Indian lands. We believe section 81 is inadequate to solve the problems posed by the 1938 Act discussed above. First, because section 81 does not apply to leases, it leaves intact the limitations in the 1938 Act. Second, the approval procedure for non-lease ventures under section 81 requires a rather cumbersome case-by-case analysis to determine whether the document submitted for approval is a service agreement within the purview of section 81 and does not convey a leasehold estate within the purview of the 1938 Act, or an interest in land within the purview of the Indian Non-Intercourse Act (R.S. 2116; 25 U.S.C. 177). Third, with the proliferation and hybridization of non-lease ventures, it is increasingly difficult to make the determination described. Without clarification of the Secretary's authority and ratification of existing ventures, some non-lease ventures previously approved may be called into question. Moreover, because of the confusion concerning the Secretary's authority to approve non-lease ventures the Department is reluctant to approve a number of proposed agreements which are pending.

We believe that enactment of S. 1894 with our proposed amendments would provide a means for the United States to promote tribal self-determination in the development of Indian mineral resources. The bill would leave to regulations the establishment of maximum terms for, the conditions of, and the manner of entering into non-lease agreements. We support this procedure because it permits the authority granted by the legislation to adapt to changes in the minerals industry and to respond to the particular requirements of numerous types of non-lease ventures.

We would like to offer, however, the following recommended amendments:

1. Section 1(a) authorizes tribes to enter into joint ventures for the disposition of "oil and gas, geothermal or other mineral resources" of tribal lands. We are advised that a number of recent cases have interpreted similar language quite narrowly, e.g., a reference to oil, gas and other minerals was held to apply only to energy minerals under the principle of ejusdem generis. In order to prevent such an interpretation and to clarify the legislative intention that the bill applies to all mineral resources, we suggest that line 1 of page 2 be amended to read "of oil and gas, geothermal, coal, or other energy or nonenergy mineral resources . . . ."

2. Section 1(a) provides for approval within one year by the Secretary of any agreement submitted to him unless the Secretary finds it is not in the best interests of the tribe. We do not believe the Secretary should be bound to approve an agreement within one year of submission because in many instances, compliance with requirements of the National Environmental Policy Act (P.L. 91-190; 83 Stat. 852), as amended, would take more than a year. In addition, the current language could be construed as giving automatic approval within one year. Such an automatic approval may not be in the best interests of Indian mineral owners. Therefore, we recommend that this be clarified.

3. Section 1(b) provides for "Presidential review" of disapproval of a tribal proposal. We are not aware of any statutory requirement or procedures for such a review. Lease approval decisions are normally made by BIA field officials under delegated authority. Thus, administrative review procedures currently exist, and we believe those should be followed. We therefore recommend that the second sentence of section 1(b) be deleted from the bill.

4. One of the purposes of S. 1894 is to provide for legislative ratification of certain Indian mineral resources development agreements previously approved by the Secretary. As noted above, since 1975 the BIA has approved a number of tribal mineral development agreements which did not purport to be leases, and thus were not treated as being subject to the 1938 Act. Since questions remain about the adequacy of the Secretary's authority to approve such non-lease mineral development agreements, there is a need to ratify these past agreements which were approved in good faith and at the urging of the affected tribes. Section 3 of S. 1894 was no doubt designed to achieve this purpose by ratifying all prior "agreements of the type described in the first section of this Act." However, this language is unnecessarily broad since section 1 of S. 1894 also authorizes leases. As a result, all past leases of tribal minerals which may have been approved by a BIA official would be ratified by S. 1894 -- no matter how old or legally defective the lease may

be. We are certain this result was not intended. To narrow the scope of this ratification provision, we recommend the following language:

> "Sec. 3. Any agreement for the development of tribally owned minerals (1) which was previously approved by the Secretary or his authorized delegate, between January 1, 1975, and the date of the enactment of this Act, and (2) which did not purport to be a lease when it was presented to the Department of the Interior for approval, is hereby considered approved as of the date of such previous approval.".

Use of the phrase, "did not purport to be a lease," is designed to avoid future inquiries over whether one of the agreements approved during 1975-1981 was or was not a lease, the very inquiry which this legislation makes unnecessary for all future tribal mineral development agreements. We believe less than a dozen approved agreements fall within the scope of this proposed alternative language for section 3.

5. Section 4 of the bill requires that the Secretary promulgate rules and regulations to implement the Act within 180 days. We suggest that the phrase "of the date of enactment of this Act" could be added. More important, we believe the legislative history should indicate that this requirement is not to be interpreted to affect the effective date of the Act, and that the Secretary is not precluded from approving any proposed agreements pending in the Department on the date of enactment until final rules and regulations have been adopted.

6. We believe that a provision should be added to the bill holding the Secretary harmless in the event a tribe suffers damages alleged to have arisen as a consequence of approval by the Secretary of an agreement authorized by this legislation. The kinds of tribal profit-sharing agreements envisioned by S. 1894 may involve substantial risks which we understand tribes would be willing to assume to provide an opportunity to maximize tribal profits and control over operations. Since the Secretary will be advising tribes on the consequences of these agreements, pursuant to his approval authority, we believe it is the tribes, as the parties to these agreements, who should assume the risks, and that the federal taxpayer should not be a guarantor of the wisdom of the tribes' and the Secretary's business judgment. Accordingly, we also believe that the Secretary should be required to make findings concerning the best interest of the Tribe whether he approves or disapproves a lease. These findings should be stated thirty days before his final decision is made, in the event that a tribe might want to reconsider entering into an agreement as a result of those findings. We therefore recommend that section 1(b) be amended to read as follows:

> "(b) Whenever the Secretary approves or disapproves an agreement pursuant to subsection (a), he shall state his findings in writing at least thirty days before making his decision. Such findings shall be made available to the tribe, but shall otherwise be considered exempt from disclosure under the Freedom of Information Act.".

The provision for exemption from disclosure under the Freedom of Information Act would insure that a tribe is not done competitive harm by

the release of an economic assessment of its proposed agreement, transmitted in confidence and exclusively for the tribe's benefit.

We also recommend that the following new section 6 be added:

> "Sec. 6. No provision of this Act shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, or to grant implied consent to any person or Indian tribe to sue the United States or any of its officers for any damages alleged to have arisen as a consequence of an approval by the Secretary of the Interior pursuant to section 1 of this Act.".

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

Ken Smith

Assistant SECRETARY

Amoco Production Company
200 East Randolph Drive
Post Office Box 5340A
Chicago, Illinois 60680
Exploration Department

J. W. Wideman
Manager, Land (USA)

March 11, 1982

The Honorable William S. Cohen, Chairman
Select Committee on Indian Affairs
United States Senate
Room 6313 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Cohen:

Please include this letter in the record of hearings on S. 1894, to permit Indian tribes to enter into certain agreements for the disposition of tribal mineral resources.

Amoco Production Company (U.S.A.) is a wholly-owned subsidiary of Standard Oil Company (Indiana). Our primary job is finding and producing oil and gas throughout the U.S. Amoco's Denver Region covers the 16 western states and we have a substantial number of oil and gas leases with Indian tribes in the region.

We support your stated concept for S. 1894, to permit Indians to join in agreements to promote "self-determination for energy development by allowing tribes to be involved in managing the development of their own resources in a number of ways not now possible under existing law."

We also support the concept of continuing oversight by the Secretary of the Interior. However, while we believe the Secretary should have approval authority, we are concerned about the wording of one provision in the proposed legislation relating to the Secretary's power to prescribe regulations pertaining to the agreements.

Paragraph one of the bill clearly gives the Secretary approval authority unless he finds certain unacceptable conditions exist. However, the sentence, "Any such agreement shall be for such term and be subject to such conditions as may be prescribed by the Secretary by regulations," if taken to its logical conclusion, could defeat the purpose of the bill.

If it is proposed that regulations will be general enough to allow the agreements made to be appropriated for different tribes in different geographic areas, the bill should clearly say so. As written, Indians and those with whom they seek to do business might have nothing to

negotiate because of existing regulations which say what provisions must be in the agreements. For example, primary term or royalty rate regulations might be inappropriate in certain geographic areas. If the "regulation provision" is retained in the bill, it should clearly spell out the nature of the proposed rules, and we strongly urge that you specify regulations general enough to allow the tribes maximum flexibility in making their agreements.

If regulations are adopted after the effective date of an approved agreement, is it contemplated those regulations will be incorporated into the agreement by reference? If so, the agreement may be unacceptably modified by the regulations. If the objective of the legislation is to grant Indians a bigger say in mineral development, we believe the "regulation provision" should be deleted or rewritten.

Thank you for giving us the opportunity to comment on this important legislation.

Sincerely

J. A. Sidman

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March 10, 1982

The Honorable William S. Cohen, Chairman
Select Committee on Indian Affairs
United States Senate
1251 Dirksen Senate Office Building
Washington, D. C. 20510

Re: S. 1894 - A Bill to Permit Indian Tribes to Enter into Certain Agreements for the Disposition of Tribal Mineral Resources, and for Other Purposes

Dear Chairman Cohen:

On behalf of our client, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (the "Tribes"), we submit the following comments on S. 1894 in connection with the hearings being held on the bill on March 16, 1982.

The Tribes support wholeheartedly the intent of the legislation, which is to allow tribes greater flexibility in the management of their resources. We believe, however, that the following amendments are necessary prior to the enactment of the bill:

Section 1(a)

The penultimate sentence, which provides that a mineral agreement "shall be for such term and be subject to such conditions as may be prescribed by the Secretary by regulation," appears to give the Secretary unlimited discretion in dictating terms and conditions for mineral agreements. This is undesirable and contrary to the concept of Indian self-determination regarding disposition of their resources. The

sentence also conflicts with the next sentence, which requires the Secretary to approve any agreements "unless the Secretary finds that such agreement is not in the best interests of the tribe." This suggests a far more limited level of secretarial discretion and review. We therefore would suggest that the second to last sentence of section 1(a) be amended to read:

> "Any such agreement shall be subject to approval of the Secretary."

The one-year period which the last sentence of section 1(a) gives the Secretary for approval of mineral agreements clearly seems excessive. During such an extended review period the financial and economic considerations giving rise to the agreement could change significantly. A 90-day approval period would be preferable, and would seem fully adequate.

The last sentence of section 1(a), as currently drafted, also leaves unclear what the status of an agreement would be in the event the Secretary failed to take any action (either approving or disapproving) within the review period provided. We would suggest therefore that a new sentence be added to section 1(a) to read as follows:

> "If the Secretary fails to approve or disapprove of the agreement within such time period, the agreement shall be deemed approved."

Finally, we would suggest that the parenthetical "(other than a lease approved pursuant to the Act of May 11, 1938)," be deleted from section 1(a) as being superfluous and somewhat confusing. Section 4 of the bill makes clear that the bill represents an alternative to the leasing provisions of the 1938 Act, and the parenthetical adds nothing to that.

Section 1(b)

We suggest that the second sentence of this provision, providing for possible presidential review of secretarial disapproval of agreements, be deleted. This concept, which appears to be a relatively novel one, could be replete with hidden difficulties. First, it provides no time limitation within which the President must act and gives the President no standards for review. In addition, the right to presidential review could delay a tribe's ability to secure judicial review, since until a presidential decision has been issued, final agency action may not have occurred. The courts also may be far more reluctant to

overturn presidential affirmance of secretarial action than they would be to reverse simply the Secretary's decision. Thus, while the goal of providing tribes with a speedy review process is commendable, we do not believe that this provision for presidential review is the proper means for accomplishing that.

Section 2(b)

This section, which allows the Secretary to approve mineral agreements for individual Indians, leaves unclear whether the various procedural provisions of section 1 (e.g., the time limitation on secretarial review, presidential review, etc.) are intended to apply here as well. The section also fails to deal with the possible conflict which could occur between actions which are in the best interests of a tribe and actions in the best interests of individual Indians. We therefore would suggest amending section 2(b) to read as follows:

> "The Secretary, in accordance with the procedural provisions of section 1, may approve agreements listed in section 1 for individual Indians owning trust or restricted minerals. The Secretary may disapprove any such agreement which is not in the best interest of either the individual Indian or the tribe."

We appreciate this opportunity to submit the Tribes' views and hope that these comments will be of help to the committee.

Sincerely,

WILKINSON, CRAGUN & BARKER

Foster De Reitzes

By: Foster De Reitzes

Copies to:
The Honorable Barry M. Goldwater
The Honorable Mark Andrews
The Honorable Slade Gorton
The Honorable John Melcher
The Honorable Daniel K. Inouye
The Honorable Dennis DeConcini
Tribal Council of the Confederated Salish and Kootenai Tribes
Mr. Fred Houle, Jr.
Ms. Evelyn Stevenson

Senator MELCHER. This concludes our hearing this morning. The hearing is adjourned.

[Whereupon, at 1:35 p.m., the hearing was adjourned.]

APPENDIX

ADDITIONAL MATERIAL RECEIVED FOR THE RECORD

CROW TRIBAL COUNCIL
Office of the Chairman
Post Office Box 580
Crow Agency, Montana 59022

Forest Horn, Chairman
Donald Stewart, Sr., Vice-Chairman
Theodore (Ted) Hogan, Secretary
Henry Real Bird, Vice-Secretary

Phone (406) 638-2601

Crow Country

March 22, 1982

Honorable John Melcher
Senate Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20240

Re: Senate Bill S. 1894

Dear Senator Melcher:

This is in reply to your request for the views of the Crow Tribe of Indians, Montana, with respect to S.B. 1894 introduced by you on November 30, 1981. The bill in its present form would grant authority to the Secretary of the Interior to approve business agreements associated with the development of mineral resources on Indian lands for which he does not now have the authority to approve. Presently the Secretary's authority is largely constrained by the 1938 Mineral Leasing Act which requires that a series of statutory steps be followed before the Secretary can approve the mineral lease. That Act was designed principally to foster competetive bidding for those mineral resources. This process as defined by the 1938 Act should remain in place, it still has present value and utility in many instances and therefore we are in agreement with this bill in that it does not eliminate the procedures therein.

Although I believe such a bill as this is necessary to provide greater flexibility to the Secretary in the area of mineral agreement approval, this bill has some serious drawbacks. Section One allows the Secretary one year to review a mineral agreement submitted to him for approval before he is required to take action. This is an inordinately long period of time. Recognizing that the review process by the Secretary and his staff should not be conducted in a cursory fashion; nonetheless, the review should be able to be

made within a maximum time of six months from date of submittal. Section 2 of the bill permits individual Indians owning trust or restricted property to participate in the tribal mineral agreements or to execute separate agreements. This section is ambiguously drafted in that it should clearly reflect that those individual agreements are subject to the same type of approval constraints outlined in Section 1. Finally, Section 3 ratifies all pre-existing agreements of the nature of this bill intends to grant Secretarial authority to approve. I believe this creates a potentially dangerous precedent by sanctioning statutory authority. I, therefore, propose that those agreements referenced in Section 3 be resubmitted if this bill is enacted to the Secretary for his approval within a prescribed time-frame such as 90 days and that he must take some action within 180 days of this submission.

If these changes were made in the bill the Crow Tribe would in all probability be prepared to support its enactment. However, in its present form as Administrative Chairman for the Crow Tribe, I cannot support the bill or recommend to the Tribal Council that it do so.

Respectfully submitted,

Donald Stewart, Sr.
Administrative Chairman
Crow Tribe

Nonlease agreements or lease agreements which have incorporated into their terms provisions for nonlease or joint venture type operations.

1. Blackfeet-Damson Oil Corporation - Exploration Service Agreement, approved June 1975.

2. Jicarilla-Odessa Natural - Oil and Gas Development Agreement, approved May 18, 1977.

3. Navajo-Exxon - Prospecting permit with option to lease for uranium mining, contains joint venture provision, approved January 4, 1977.

4. Jicarilla-ARCO - Oil and Gas Development Agreement, approved March 19, 1979.

5. Wind River-Wesseley Energy Corporation - Oil and Gas Exploration and Development Service Agreement, approved February 21, 1980.

6. Northern Cheyenne - ARCO Exploration Service Agreement, approved August 21, 1980.

7. Navajo Tribe - Petroleum Energy, Inc. Operating Agreement, approved April 1, 1981.

Lease or nonlease agreements pending approval:

1. Crow-Shell Oil Corporation - Coal mining lease with joint participation provisions. Not yet formally approved by DOI.

2. Navajo Resources, Inc. - Oil and gas lease which was not advertised and requiring waiver of regulations. BIA Navajo Area Office refused to approve. Has been appealed to Washington Office which supported Area Director. Case now before the Board of Indian Appeals.

3. Navajo Tribe - Chuska Energy Inc. and Chuska Exploration. Agreement submitted to Washington Office for approval. Notification given to Chairman MacDonald, January 25, 1982 that Department would not approved any further agreements not clearly authorized by Congress, and recommending competitive bidding lease sale.

In the past six months there have been seven nonlease agreements submitted to our Denver Office for review. They have either been returned for modification or are being held pending enactment of S-1894.

THREE AFFILIATED TRIBES • FORT BERTHOLD RESERVATION
Mandan, Hidatsa and Arikara Tribes
TRIBAL BUSINESS COUNCIL
P.O. Box 220 • New Town, North Dakota 58763 • (701)627-4781

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August Little Soldier
Vice-Chairman
South Segment
Tillie Walker
Secretary
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Gerald White, Sr.
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East Segment
Matthew Mason
North Segment
Roy Bird Bear
West Segment
Nathan P. Goodiron
West Segment
Thomas Eagle, Jr.
East Segment
Willard Little Owl
South Segment
Marie D. Wells
Northeast Segment
Willard Yellow Bird, Sr.
East Segment

COMMENTS OF THE THREE AFIILIATED TRIBES
OF THE FT. BERTHOLD RESERVATION, NORTH DAKOTA
ON S. 1894 BEFORE THE SENATE SELECT COMMITTEE
ON INDIAN AFFIARS, MARCH 6, 1982

The Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, appreciate the opportunity to present their views in support of S. 1894. On the Fort Berthold Reservation, the mineral assets developed to date are oil and gas. The majority of these interests are owned by individuals allottees, although the Tribes also have valuable oil and gas lands. In the past few years, oil and gas leasing and development on the Reservation have increased in astounding proportions. Prior to 1975, there were few Indian oil and gas leases within the Reservation borders. The 465,000 Indian-owned acres in the Reservation are leased for oil and gas development. In addition, the Tribes hold very substantial coal interests which will no doubt be developed in the future.

Both for current oil and gas development and future mineral development, the Tribes consider it essential that they and their individual members be free to negotiate a wide variety of agreements so as to obtain the best economic return and the most orderly and effective development. Although it appears that existing law would give considerable flexibility for various types of arrangements in mineral development, the BIA and the USGS have consistently taken a very restricted view of Indian authority to negotiate outside the perimeters of the standard BIA lease forms. Indeed, the Bureau's regulations which would have permitted such negotiations have never been issued in final form, although they have been pending now for nearly five years. Therefore, definitive legislation is clearly needed and the Tribes basically support S. 1894.

We would, however, like to suggest some changes in the provisions of the existing bill. First, the yearlong period for Secretarial approval appears to us to be excessive. Our experience with the Bureau of Indian Affairs teaches us the the maximum period soon will become the Bureau's minimum for action. This could result in loss of economic opportunity and, in the case of oil and gas, even drainage from Indian lands. In any case in which an Environmental Impact Statement is not required, the Secretary should be able to make his decision within 60 days. This would cover much oil and gas leasing. In cases in which an Environmental Impact Statement in necessary, six months is sufficient time for Secretarial action.

On the other hand, in cases where the Secretary disapproves an

agreement, the tribe should have 60 days to seek Presidential review. This would give the tribes not only an opportunity to seek review, if necessary, but to cure deficiencies which the Secretary might find in the agreement. For the sake of consistency, we would suggest giving the Secretary 60 days from the date of his decision within which to state his findings in writing.

Second, while we support the concept, we are concerned with S 2 (b) of the bill which allows the Secretary to approve a wide range of mineral dispositions for individual Indians. Unlike tribes, individuals often do not possess the knowledge or resources for sophisticated negotiations. Once an agreement is struck, a great deal of pressure can be brought to bear by mineral developers to obtain Secretarial approval. Further, Secretarial approval is frequently given at a low level by people who are, themselves, rather unsophisticated in mineral matters. Therefore, we think that individual Indians require more protection than the bill presently affords. The best way to protect the allottees would be to enhance the tribes' role in the development of individual minerals. The bill already allows individuals to commit lands to tribal ventures. It should also provide for the tribes to negotiate for its individual members with their consent. This would allow tribes to block lands for development, offer more attractive development ventures, and negotiate from a position of strength on behalf of its members, using the expertise available to the tribe.

Further, funds should be provided so that tribes can establish programs to assist their members in these ways. If funding cannot be

provided to tribes to protect their members' interests with expert assistance, then the Bureau of Indian Affairs and the USGS should be required to allocate resources to this purpose. Further, unless tribal assistance programs are established, individual lands should first be offered for competitive bid. As under present law, the allottees could reject the highest bid and negotiate, but they would have the protection of knowing what the market value of the lands is in a competitive bidding situation. If the allottees are left to face mineral negotiators on their own, the result will be severe overreaching and outright fraud in many cases.

We thank you for this opportunity to present our views on this important legislation.

Respectfully submitted,

Austin E. Gillette, Chairman

Three Affiliated Tribes

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RECEIVED MAR 22 1982

March 16, 1982

Select Committee on Indian Affairs
United States Senate
Room 6313 Dirksen Building
Washington, D.C. 20510

The enclosed letter is submitted for the published record of your Committee's March 16 hearing on S.1894.

I would appreciate receiving a copy of the printed record when it becomes available.

If I can be of any service to the Committee in providing documentation of the facts discussed in my letter, or extended discussion of the bill, I will be honored to do what I can.

I've taken the liberty of enclosing a curriculum vita in the event that anyone is curious about who I am or how I come to be interested in this particular legislation.

Sincerely,

Russel L. Barsh
Associate Professor

UNIVERSITY OF WASHINGTON
SEATTLE, WASHINGTON 98195

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March 16, 1982

Senator William S. Cohen, Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Cohen:

As a student of Indian reservation economic development particularly familiar with the Fort Union fossil fuel basin, I feel obliged to comment on S.1894, currently under consideration by your Committee. My concerns go beyond the general merits of the bill to its peculiar potential for destabilizing the government and economy of the Northern Cheyenne Tribe.

General scope and effect

On its face, S.1894 is a general measure increasing tribes' options for developing mineral resources.

The Act of May 11, 1938 (25 U.S.C. 396a-396f) authorizes "leases" of tribal minerals with the discretionary approval of the Secretary of the Interior. Ordinarily these leases are tendered at public auction and remain subject to Secretarial supervision in similar manner to leases of public lands of the United States.

Tribes have expressed some concern that mineral programs involving a greater degree of direct tribal participation, such as joint ventures with corporate investors, may not be lawful because they are not "leases" in the strict sense. Uncertainty over the lawfulness of such arrangements chills development. The apparent purpose of S.1894 is to remove this uncertainty and thereby encourage tribal mineral projects.

For this moderate and appropriate end, however, the means could be drawn with greater care. S.1894 does not amend the 1938 mineral leasing act. It provides separate and independent authorization for tribes to make any "joint venture agreement, operating agreement, joint production agreement, risk services agreement, managerial agreement . . . or other agreement"--anything, that is, except a "lease" already authorized by the 1938 act.

Together with this separate authorization, S.1894 provides for separate Interior regulations for the structure, review and approval of mineral agreements.

What purpose is served by two separate authorizations, two different sets of Interior regulations, and two alternative review channels, one for "leases" and the other for everything else? If the goal of S.1894 is to reduce legal uncertainty in tribal mineral projects, this procedural dichotomy will defeat it. In place of uncertainty whether an agreement, once made, can be voided because it is not sensu stricto a "lease" (the problem today), we will have uncertainty whether an agreement, once approved, should have been approved as a "lease" or as something "other." Every agreement made will still be vulnerable to legal challenge on the question of whether or not it is a "lease."

Nor are the new review standards proposed by S.1894 any reasonable improvement over those already applicable to "leases." The only guidance S.1894 gives the Secretary is to consider "the best interests of the Indians." This sweeping grant of paternalistic discretion is a throwback; it is time Congress began seriously deregulating tribal economies rather than subjecting them to ever-more pervasive federal administrative control. The Secretary moreover has up to one year to act on tribal proposals. This is far too long if the idea really is to get tribes directly into the energy business. A year's delay can cost an energy deal millions--or kill it outright.

The unprecedented provision for direct appeal of the Secretary's decision to the President is also strange. It seems to make the final judgment if what is in Indians' "best interests" frankly political.

What we have, then, is an entirely novel administrative review procedure that is unusually political, time-consuming, and lacks precise standards. That is difficult to reconcile with the current intellectual climate in the Capitol.

Special application to Northern Cheyenne

As a purely prospective measure, S.1894 is problematic, but its retroactive effect is cause for even greater concern. Section 3 "ratifies" all past tribal mineral agreements vulnerable to legal attack because they may not have been "leases." Curing past agreements' technical defects to avoid unnecessary and unproductive litigation is, as a general proposition, a good idea. But your Committee should take heed in this not to ratify, unwittingly, past agreements which are substantively defective and richly deserve judicial intervention. To do so would take away what little remains of "trust responsibility" and seem to place indulgence for the energy industry ahead of due regard for Indian survival.

One agreement that would be affected by section 3 is a May 28, 1980 instrument granting ARCO extraordinary exploration and development privileges on the Northern Cheyenne Reservation, in the home state of S.1984's Senate sponsor. The agreement gives ARCO a power of private eminent domain over individual Indian lands on the reservation, and liquidates damages for these takings at nominal rates.

Secretarial approval of this agreement arguably was a breach of the statutory duty of protection owed to Cheyenne allottees: it alienated their lands without their consent or a showing of direct benefit to them.

Allottees brought a proper petition for a referendum on the ARCO agreement to the Tribal Council. The Council refused to call the election--a constitutional crisis in which the Interior Department expressly declined to intervene.

Allottees then challenged the ARCO agreement in tribal court and won at trial. The Tribal Council promptly sacked the presiding judge and replaced her with one that immediately ruled against the allottees, ex parte and without a hearing. A second constitutional crisis.

Last summer allottees organized to challenge the ARCO agreement in federal court on the theory that it was not a "lease" within the meaning of the 1938 mineral leasing act. Coincidentally, S.1894 was filed shortly thereafter. Section 3 of S.1894 would deprive the allottees of the technical grounds they need to invoke federal jurisdiction.

There is a larger issue at stake at Northern Cheyenne--a growing pattern of wanton disregard for orderly constitutional process in the haste to develop mineral resources.

To illustrate: for more than a year tribal officials have been negotiating secretly to acquire some 50,000 acres of off-reservation federally-reserved coal in partnership with Burlington Northern, Equitable Life, and Montana Power. Tribal members have routinely been denied access to documentation of these negotiations, and barred from attendance at meetings of the Tribal Council. Tribal lawyers were directed to design a "development authority" agency to which the Tribal Council could delegate its mineral leasing powers outside public view, without open meetings or records.

In January, 1982 tribal members collected sufficient petition sugnatures to mandate a referendum on subjecting all future mineral deals to public scrutiny. The Tribal Council refused to call the election--a third constitutionl crisis, in which the Interior Department again declined to intervene.

For all intents and purposes, Northern Cheyenne is now operating without a constitutional government, and is dealing in tribal minerals without the knowledge or consent of its citizens.

It would reflect poorly on Congress to enact legislation retroactively ratifying technically deficient mineral deals of the Northern Cheyenne Tribal Council in this state of affairs. On the contrary, the collapse of Northern Cheyenne constitutional government, and possible collusion of energy development firms and federal officials in bringing it about, deserve the most intense scrutiny by your Committee.

If your Committee is aware of other tribes operating under mineral agreements they fear may be challenged as "not leases," S.1894 certainly can identify them individually, at their request, in section 3. As drafted, S.1894 unavoidably subjects your Committee to criticism that it is proposing special legislation--directed at chilling dissent at Northern Cheyenne--disguised as a general law addressing a general problem.

This suggests two alternatives for redrafting S.1894 to bring about some general improvement in tribal mineral development with the least adverse consequences:

(1) simply amend the Act of May 11, 1938, to include the words "joint venture agreement, operating agreement, joint production agreement, risk services agreement, managerial agreement, . . . or other agreement;" or

(2) replace the Act of May 11, 1938 completely with a cleaner, comprehensive authorization more favorable to tribal self-determination and creative approaches to development.

In either case I would urge that the change have only prospective effect, and that language be included to protect the security of property of individual tribal citizens.

Prospectus

The larger problem deserves your Committee's immediate attention, however: tribes are particularly tempting targets, and highly vulnerable to manipulation by outside investors.

The stakes are high, not only because tribes have rich mineral reserves, but because minerals often can be developed more cheaply on reservations. The cost breaks are three:

(1) tribal minerals often are held in large, undivided units, reducing developers' cost of assembling tracts of commercially-suitable size--at Northern Cheyenne the Tribal Council could give ARCO this benefit only by ignoring the rights of individual surface landowners;

(2) tribes can shelter developers from state taxes--such as the 30 per cent Montana severance tax--and from state environmental regulations, agreeing to lower air and water quality standards than typically are required elsewhere; and

(3) tribes own considerable quantities of water, needed for synfuels processing, plant cooling and slurry transport--acquiring sufficient water has been coal developers' principal obstacle in the Fort Union basin for the past five years.

It also has been suggested that tribal governments may shelter developers from labor legislation, resulting in lower wage scales and less threat of strikes.

For all of these reasons, developers have palpable incentives to win tribal deals, and can afford to spend considerably more effort and money to win them.

Tribes are vulnerable to manipulation because they are small and poor, but even more because their federally-designed "constitutional" legislatures are not legally accountable for their actions. After Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), tribal constitutional limitations on legislative powers can be enforced

only by tribal judges, and tribal judges serve at the pleasure of the legislature. Hence the tribal council is for all practical purposes the final arbiter of the lawfulness of its own actions--until the next election.

Subsequent elections are powerless to put minerals back in the ground, however, or to unpollute air or water. This is why some contingent control over lawmakers, whether by judicial injunction, or by recall and referendum, is necessary.

As the Northern Cheyenne case illustrates, however, a corrupted tribal legislature may, with impunity, simply refuse to hold elections.

Congress should consider carefully the danger of fostering within the United States the kind of "banana republic" autocracy Americans are fond of criticizing in Central and South America. In my humble opinion, this means assuring tribal citizens of

(1) free and fair elections in accordance with their tribal constitutions, and

(2) full access to tribal meetings, and to federal and tribal documents of tribal actions.

If these modest essentials of political freedom are not contemplated by the ideal of "trust responsibility," then it is incomprehensible to me what is left of that notion.

The problem of external manipulation of tribal governments can be solved peacefully by internal tribal political processes--provided federal officials do not support tribal officials who prevent elections, destroy or conceal records, or use the police power to intimidate dissenters.

If the United States insists on retaining the power, conferred by tribal constitutions through 25 U.S.C. 476, to veto tribal legislation on "protective" grounds, surely it has the power and duty to veto tribal actions which subvert federally-approved constitutions and strip tribal members of meaningful democracy. If not, then all pretence of "trusteeship" should be abandoned candidly.

Respectfully,

Russel L. Barsh
Associate Professor

RUSSEL LAWRENCE BARSH

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Born: May 4, 1950

EDUCATION

A.B., summa cum laude, Harvard College (Social Anthropology), 1971

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TEACHING

Associate Professor of Business, Government & Society, University of Washington Graduate School of Business Administration, 1974-

BGS 200, "Introduction to Law"; BGS 310, "Business and Public Policy"; BGS 510, "Business and Public Policy"; BGS 540, "Culture Change and Modernization"; GIS 412, "Policy Cycles in Native American History"; AIS 475, "Contemporary Indian Issues"; HUM 235, "Ideas in Africa, Oceania and the Americas"; The Management Program; invited lectures in Education, Social Work, Sociology, Anthropology, American Indian Studies and Marine Studies

Teaching Fellow in General Education, Harvard College, 1972-74

Social Sciences 96c, "Growth and Process in American Law: the American Indian"; Social Sciences 152, "Native Americans in Cultural and Historical Perspective"

PROFESSIONAL

Editor, Journal of Contemporary Business, and Director of Business Administration Faculty Publications, (1977-1981)

Member, Washington State Bar Association; Chairperson, Seattle/King County Bar Association Advertising Committee, (1979-1980); admitted to practice United States Supreme Court, United States Court of Claims

Counsel, Oglala Sioux Tribe (since 1980); Mikmag Nation (since 1979)

Consultant, Lummi Tribe (1978), Lower Elwha Tribal Community and Klallam Tribe (1975-81), American Indian Higher Education Consortium (1978), Quinalt Nation (1979), Association of American Indian and Alaska Native Social Workers (1979)

Instructor, Pacific Northwest Institute on Indian Law, University of Puget Sound Continuing Legal Education Program (1977-1979); Native Village Management Program, Sitka, Alaska, (1976-1977)

HONORS

"Seattle's 100 Newsmakers of Tomorrow," Time Magazine and Seattle Chamber of Commerce (1978)

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WORK CURRENTLY UNDER REVIEW

A Multiple-Use Approcah to Steelhead Allocation
U.S. Corporate Cowboys Still Fighting Indians--This Time in the Arctic
Indigenous North American Under International Law

DNA-PEOPLE'S LEGAL SERVICES, INC.

PETERSON ZAH
DIRECTOR

NORMAN RATION
DIRECTOR OF ADMINISTRATION

KENNETH L. BEGAY
DIRECTOR OF COMM. LEGAL ED

LAWRENCE LONG
ADVOCATE-IN-CHARGE

POST OFFICE BOX 306
WINDOW ROCK, NAVAJO NATION, ARIZONA 86515
TELEPHONE (602) 871-4151

ALAN R. TARADASH
DIRECTOR OF LITIGATION

WAYNE BLADH
MICHAEL C. NELSON
STEPHEN A. HARVEY
PAUL E. FRYE
BOB ERICSON
JAMES RICHMOND
ERIC BIGGS

11 May 1982

Ms. Jennie Boylan
Aide to Senator Melcher
253 Russell Senate Office Building
Washington, D.C. 20510

RECEIVED ... 1 / 1982

Re: S. 1894

Dear Ms. Boylan:

Thank you for sending me a copy of S. 1894. I send these materials in response to our phone conversation. Because this organization has dealt with mineral leasing cases for individual Indian allottees, we have developed some knowledge about (1) the ability of Navajo allottees to negotiate with energy companies and (2) the performance of the oversight duty by the Department of the Interior. Because I have found a general pattern of overreaching and/or disparity in bargaining position with energy companies and a complete inability and general lack of desire of the Department of fulfill its duty to guard against improvident transactions, I recommend that Section 2 of the S. 1894 be deleted in its entirety.

Further, Section 3 of S. 1894 would constitute, in my opinion, Congressional ratification of unconscionable transactions which the Department of Interior intends to approve and should also be deleted.

My recommendations are based on the belief that S. 1894 would eliminate the competitive bid requirement of current law. If I am in error, please advise.

My first dealings with mineral development occurred in 1979, when allottees complained that the BIA and the Santa Fe Railroad had told them at public meetings that refusal to consent to a railroad right-of-way application could result in allottees going to jail. In investigating this, others (often co-owners of allotments) said that they were told that their signatures were only for the grant of a consent to survey. One woman signed in a hospital room in Shiprock, heavily sedated. Her family had requested that the railroad people not see her in the hospital, but they went anyway. After several administrative steps, a three-day hearing was held before Chief Administrative Law Judge L.K. Luoma (now in the Sacramento Office of Hearings and Appeals). He concluded that very few, if any (of the 430 allottees contacted), had knowingly and voluntarily consented to a right-of-way, and remanded the case to the BIA. He remanded for the added purpose of requiring a competent appraisal, which he found lacking.

You may wonder how so many people could have been tricked. Despite the promises of Article 6 of the Treaty of 1868, the median education level of adult Navajo is fifth grade (1970 census) with the average age about 18 years. (Id.) Because the younger adults are generally far better educated than older adults, it is to be presumed that the older people, with ownership interests in allotments, will have an education of less than second grade. Functionally illiterate, these landowners rely almost solely on the company landmen with their interpreters.

The "negotiations" with the Mobil Oil Company are another case in point. After failing to diligently develop their leasehold interests near Crownpoint, N.M., Mobil sought an extension of 2 years from the Department of Interior within which to develop their leasehold interests. They offered $16,000 per allotment for this extension. The Department, instead, said that for the same $16,000, Mobil could get new 10 year leases, with the consent of allottees.(1) Mobil, by offering cash "side payments" not authorized by any regulation, signed up most of the land owners. Others who did not "sign up", were harassed by Mobil, and one woman living in Denver reports being followed by Mobil personnel as she drove in Denver. Many of the better educated people did not consent, so Mobil requested a rule-making to deal with the problems of people making "unacceptable demands" of it. (45 F.R. 29070, May 1, 1980.) The Department proposed its own rules (45 Fed. Reg. 53165, August 11, 1980), but neither was adopted. Instead, during the pendency of appeals within the Department and without notice to the Indian appellants, the Department approved the leases under the authority of an unpublished Solicitor's opinion which contradicted decades of Departmental policy. One Indian appellant signed when told that if he did not sign that day, Mobil would get his minerals for free. The Mobil "negotiations" are exemplified by the attached affidavits.

With this background, and the background of outright theft of Indian oil, gas, and minerals by major companies as found by the Linowes Commission, the competitive bidding requirement is the last protection for the Indian mineral owner. The Indian allottee is typically unsophisticated, uneducated, easily misled, and impoverished. The Department is both unequipped and unwilling to fulfill its oversight role--and the protections envisioned by S. 1894 will be illusory.

The Assistant Navajo Area Director, Ted Koenig, recently testified before the U.S. Commission on Civil Rights that:

> The Bureau of Indian Affairs has always had a great deal of difficulty in-house of coming up with this kind of expertise [technical aspects of mineral leasing]. It is very difficult to compete with energy companies. They are able to pay much more than the government.... We did contact the USGS and the Bureau of Mines, but we have not been completely satisfied with the assistance we have gotten from them because <u>they also don't have the kind of expertise that is needed</u>. Let's face it, the energy companies are out there, they are doing the exploratory work, they know what is there.... For us to go out there would be almost impossible. Moreover, the information we have been able to extract from them in the past has not been interpretive data, you know, it's raw data. <u>To take that data and do economic analysis ... is almost impossible for us to do</u>. (Emphasis added.)

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(1) A competitive bid for a relatively unexplored 640 acre tract in nearby Milan, N.M. brought a bonus of over $10,000,000.

Energy Development in Northwestern New Mexico: A Civil Rights Perspective, January, 1982 (report of the New Mexico Advisory Committee), pp. 109-110. Koenig also said that "The companies ... are in control in the sense they know whether they are going into production or not. They are also the ones that came in and requested permission to negotiate." (Id., p. 108)

To grant permission to "negotiate" with uninformed allottees and an uninformed Bureau, and to accept without question the bonus figure offered by the company "in charge" is simply an abdication of the Bureau's duties to the allottees. Consistent with the Census data, the Committee noted at p. 97 that "very few Navajos even understand English to a degree necessary to interpret lease agreements". The Committee found explicitly as follows:

Finding 2:

* * *

> The Advisory Committee concluded and some BIA officials acknowledged that the BIA has neither adequate staffing nor sufficient technical skills to properly advise and represent Indian landholders in negotiations involving mineral leases and related agreements. Furthermore, the BIA has not conducted an inventory of mineral resources on Indian land, and in the absence of such technical data, Indian owners were found to be at a significant disadvantage in protecting their natural resources or assuring adequate remuneration for their mineral rights.

The thrust of S. 1894 is contrary to the best interests of Indian allotment owners and Tribal members, although, obviously, the companies which profit from the disparity of bargaining power and from the incompetence and lack of concern of the Department will enthusiastically support the Bill as an advancement in "self-determination." Thus, I strongly urge reconsideration of the removal of the competitive bidding safeguard. Competitive bidding was considered vital by the Federal Trade Commission. (Staff Report on Mineral Leasing on Indian Lands, October 1975). It is essential now, and S. 1894--at least as it applies to allotments--would leave Indian allottees at the untender mercies of energy companies with no effective safeguards.

Please inform me of future developments concerning S. 1894. Thank you for your consideration.

Very truly yours,

Paul E. Frye
Attorney-at-Law

PEF/rls

STATE OF ARIZONA)
) ss. AFFIDAVIT
COUNTY OF APACHE)

KENNETH WILLIE' being duly sworn, deposes and says,

1. I am a Navajo Indian, C#95777, with allotment interests near Crownpoint, New Mexico.

2. I was aware that Mobil Oil Corporation wished to lease an allotment or allotments in which I have interests. Thus, I visited DNA People's Legal Services in Crownpoint so that they would represent me in dealings with Mobil or with other companies who may wish to lease my allotments after the Mobil lease expires.

3. Although I live in the Low Mountain area near Pinon, Az., I worl for the Union Pacific Railroad in Utah.

4. Billy Johnson called me when I was working. This was in June o July, I believe, of 1979. I returned his call and he said he was working for Mobil and needed to know where I was and that he had been waiting for me. I told him where I was and he said that he would come up to see me.

5. Billy Johnson came up. He had on a baseball cap and short sleev shirt, I recall. He brought a lot of papers and said I should sign I said I thought the money was too low, but Mr. Johnson said that that day was the deadline, that if I signed the next day, I'd get nothing. He also had a check for $400 made out to me. Because of the time pressure posed by Mr. Johnson, I could not consult with my attorneys and ask questions to see if he was telling the truth. I asked him some questions but didn't get satisfactory answers -- onl that today was the last day I could sign and get money.

6. I have no formal education and read almost no English and speak and understand very little English. Nothing was read or interpret to me by anyone and no one from the BIA helped me evaluate the proposal or any alternatives I had. I am unsophisticated in legal matters.

7. I wish DNA-People's Legal Services to represent me to rescind the lease or to get me more money from my allotment and mineral interests or both. They may file suit on my behalf to do this.
8. I know the above on my own personal knowledge and it is true to the best of my information and belief.

Kenneth Willie

Miller Nez, being duly sworn, deposes and says.
1. I am fluent in the Navajo and English languages.
2. I have read and interpreted the above affidavit to Kenneth Willie in the Navajo language which he has indicated he understand
3. Kenneth Willie agrees with all contained therein and has affixe his mark, above, in my presence this 13 day of May, 1980.

Miller Nez

SUBSCRIBED AND SWORN TO this 13 day of May, 1980, in my presence.

Carole A. Shirley
Notary Public

My commission expires
January 5, 1981

STATE OF ARIZONA)
) ss. AFFIDAVIT
COUNTY OF APACHE)

KENNETH WILLIE, being duly sworn, deposes and says:

1. This supplements my affidavit of May 13, 1980.

2. In December of 1980, I received a call at a friend's home in Utah, where I work. The caller identified himself as Billy Johnson of Mobil Oil Corporation.

3. He said that a letter had been sent to Washington concerning my interest in land that Mobil wanted to lease. He told me he wanted to see about how I felt about it, because after the end of 1980, the contract with Mobil would expire and after that it would be free for Mobil, if I didn't sign up again.

4. This concerned me, and Mr. Johnson told me to meet him at Little Bear's in Gallup on December 13, 1980 in the morning.

5. I called my lawyer, Paul Frye, to ask him about this and asked him to accompany me at Little Bears. We met at about 10:30 a.m. and Mr. Frye brought an interpreter who introduced herself as Lorraine Toledo Miles. We talked for a while.

6. Two people from Mobil then came. One was Billy Johnson and a white man who identified himself as Vance.

7. I drove all the way from Utah to see these people believing that Mobil would get my uranium for free if I didn't sign by the end of the year. This, I now believe, is not true, based on what my attorney tells me.

8. The people from Mobil said only that they saw that I still had an attorney and that the Washington documents had been interpreted to me. I said yes and they left.

9. I know the above on my personal knowledge and it is true to the best of my information and belief.

Kenneth Willie
KENNETH WILLIE

Ruby Cody, being duly sworn deposes and says:

1. I am fluent in the English and Navajo language;

2. I have read and interpreted the above affidavit to Kenneth Willie in the Navajo language and he agrees with all contained therein.

Ruby Cody
RUBY CODY

SUBSCRIBED and SWORN to before me this 18th day of May, 1981.

Marlene D. Stewart
NOTARY PUBLIC

My Commission Expires:

My Commission Expires Jan. 23, 1985

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS

KENNETH WILLIE, ET AL.	)	
	)	
vs.	)	DOCKET NOS.
	)	
COMMISSIONER OF INDIAN AFFAIRS	)	IBIA 82-2-A
	)	IBIA 82-4-A
and	)	
	)	
ANNE BEGAY	)	
	)	
vs.	)	
	)	
COMMISSIONER OF INDIAN AFFAIRS	)	
	)	
	)	

AFFIDAVIT OF KENNETH WILLIE

STATE OF _____)
: S.S.
COUNTY OF _____)

I am one of the appellants in the appeal identified above. My census number if 95,777.

2. I am 49 years old. I have had no formal education. I can understand some English but I cannot read or write English. Navajo is the only language I really understand.

3. I own interests in at least five different allotments. Some of these allotments have mining leases, some have grazing leases for which people pay grazing fees into my IIM account. Some also have pipelines and powerlines for which companies pay into my IIM account. I do not know the [illegible] of all the companies.

4. I have had the IIM account since at least 1954. I have had different amounts of money in the account since then. I check with the BIA about once or twice a year to see if there is any money in the account. The BIA does not send me any notice when money is put in my account.

5. When I go for my money, I ask where the money came from. They always tell me they don't know where the money comes from.

6. Last year (1981) around May I checked out the BIA office in Crownpoint to see if there was any money in my account. They told me I had $900.00 in the account. I filled out some papers to get the money. I asked where the money came from and the BIA employees said they did not know. I then went to Gallup BIA to get the $900.00. Nobody there told me where the money came from. Nobody mentioned Mobil Oil Corporation.

7. The last time I took money out of my account before May 1981 was about May 1980. Then I took out around $200.00 or $300.00. Nobody told me where the money came from that time either.

8. I do not know where the money came from in my account on either if these occasions. I do not know how the BIA keeps records of the money in the account.

9. The only conversations I have had with anyone from Mobil about the proposed lease have been described in

...e statements I signed with my lawyers on May 13, 1980 and May 18, 1981. I signed the lease paper Billy Johnson gave me only because he said the paper would expire the next day. He rushed me like a police officer was giving me a ticket. I tried to ask him questions but Mr. Johnson was in a hurry. He did not explain what the papers said. He told me I would get a copy later, but I never received one.

Kenneth Willie
KENNETH WILLIE

SUBSCRIBED and SWORN to before me this 1st day of April, 1982.

Irene Dowd
NOTARY PUBLIC

My Commission Expires:
My Commission Expires Jan. 23, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER PESHLAKAI, SR., et al.,)
)
Plaintiffs,) Civil Action No. 78-2416
)
vs.) AFFIDAVIT
)
JAMES R. SCHLESINGER, et al.,)
)
Defendants.)

STATE OF NEW MEXICO)
) ss.
COUNTY OF MCKINLEY)

Mary C. Largo, being duly sworn, deposes and says:

1. I am an enrolled member of the Navajo Tribe of Indians and a plaintiff in the above-entitled cause. I have personal knowledge of the matters stated herein.

2. I am 75 years old. I have had no formal education. I have never used a lawyer prior to 1978 and until 1978 had no knowledge of formal dispute resolution systems or of my rights under any environmental legislation. I am uncertain about the rights I have with my allotment and property.

3. Several years ago -- about 1968 or so -- I went with my brother Cecil Navajo who was helping me locate the allotment that my mother said I owned. We found that I had been granted an allotment a few miles west of Crownpoint.

4. After this, Cecil came again, saying that people were writing up papers concerning our land and that we should find out what was going on. We went to a trailer near the gas station across from the Circle K and there was a line of people. We waited a little, but Tom Ration's son saw me. He was interpreting for the people there. He said,"Come here, my mother" in Navajo

and said that all these landowners have papers written up for their land and that they just needed for me to sign "right here." I felt the expectation of everyone that I would and should sign. I said to Mr. Ration that I didn't write my name, so I thumb-printed the paper. I wonder even now if this was a paper which allows drillers to come onto my land.

5. Mr. Ration took a scrap of paper and wrote something on it. I asked what it was and he said to go to the office where you get money and they'll give you money for your land. I went to the IIM section of BIA after asking some people where to go. I got some money, but didn't know what it was for. I thought it might have something to do with the investigation of my allotment which Cecil and I started a couple years earlier. When I went to the trailer, no one explained anything to me; no one said what my signature purported to allow. Nothing was read or interpreted to me. I would have said "wait" if they had explained the drilling and mining to me.

6. I did not move onto my allotment until the fall of 1974. People were operating drilling rigs on the land then. I wondered why they were on my allotment. When they began drilling around my house, I went to the BIA Realty Office (Mr. Freeland) and asked why they were on my allotment. I thought I might be forced to move. This was in early 1976. He said that they were looking for something which lay under the ground so they could make money. He said that I might get some money, too. He said that they might put a mine on my land. I asked him what could be done about the problems. I said that the land was like a piece of material; that if you put too many holes in it, it becomes a rag. They made a rag of my land. There were vehicles coming

destroyed. I asked why nobody would tell me anything, and Mr. Freeland said that it would be explained to me when all was known, probably. The only thing he said to me when I asked what could be done about it was that the grass would probably be re-seeded and would grow back. They did, indeed disc a large part of my land and plant seeds there but this is like a desert now and the topsoil blows everywhere.

7. I was getting money in my IIM account, but I don't know if this was interest or if it was income from my father's account or if it was from my own. I asked at IIM but they didn't have an answer for me.

8. During the first few months at my allotment, I was most pre-occupied with my late husband's illness. He was in and out of hospitals for over a year and finally died in Gallup on December 21, 1975. I had a difficult time for the next few months.

9. When I talked with Mr. Freeland in 1976 I said that I thought they were walking all over me because I was only a woman with no one to speak for me.

10. I complained to the company people in 1976 and 1977.

11. I also visited John Perry's son on the BIA-operated Land Board in the middle of 1978. He said that he would come out to see me with a white man, but he actually came with a fat Indian who I have seen at the BIA building at Crownpoint. They talked with each other and left. My concerns were not addressed by them.

12. I was totally unaware of any lease sales in 1971 or 1972 or any other year. My attorneys have told me that I have thumbprinted a document which Mobil is using to have access to

involved in this lawsuit so that I will gain financially. This is not true. I want more information and think that the Anglos must have broken their own laws, as the laws of nature have surely been broken by them. Much is not known, or at least it hasn't been told to me. I want to know how all of this will affect me and if it can be done properly. I may allow Mobil or other companies to operate on my land, but this will depend upon a combination of financial and environmental and social considerations -- if, indeed, these companies wish to or need to re-negotiate with me in the future.

Right Thumbprint of
Mary C. Largo

INTERPRETER'S AFFIDAVIT

Elsie Peshlakai, being duly sworn, deposes and says:

1. I am fluent in the Navajo and English languages;

2. I have read and interpreted the foregoing to Mary C. Largo in the Navajo language which she has indicated that she understands;

3. Mary C. Largo agrees with all contained in the foregoing and has affixed her mark to it this 5 day of July, 1979.

Elsie Peshlakai

SUBSCRIBED AND SWORN to before me this 5 day of July, 1979.

Notary Public

My commission expires:
October 13, 1981

FOR THE DISTRICT OF COLUMBIA

WALTER PESHLAKAI, SR., et al.,)
)
Plaintiffs,) Civil Action No. 78-2416
)
vs.) AFFIDAVIT
)
JAMES R. SCHLESINGER, et al.,)
)
Defendants.)

STATE OF NEW MEXICO)
) ss.
COUNTY OF MCKINLEY)

Ha-nah-bah Charley, being duly sworn, deposes and says:

1. I am an enrolled member of the Navajo Tribe and a plaintiff in the above-entitled lawsuit. I have personal knowledge of the matters stated herein.

2. I am 81 years old approximately. I speak and understand only a very few English words. I read no English. I have never been to school. I have no knowledge or experience in legal matters and up until recently, was quite confused about the ways people get rights to land. I still don't know very much about the ways interests in land can be conveyed and about my rights to my allotment. I knew of DNA because my daughter brought me there when I was having trouble with my Social Security money.

3. I recall thumbprinting a piece of paper. I went alone to the gas station across from the Circle K in Crownpoint. A white lady was sitting there alone with a lot of papers. After I put my thumbprint down, I asked a Navajo man who had just signed his name, "Why did we sign our names? Where is the interpreter? How come nothing was said to us?" He said, "Well, we all signed our names, too. I don't know." Another woman said, "Maybe they will pay us if we sign our names." No one from the BIA was there to

help us understand.

4. Around 1975, when my son-in-law was still living and a little while after the drilling on my land was getting bad, I went to the BIA to the Superintendent Ed Plummer, because he is a leader over our people. "My son," I said, "I came to see you about my land. The drillers are really damaging my land. I want someone to look at my land so something can be done about it. No one comes to check even when I tell them to, In the future, how will it be ... worse? My land is fenced but they came inside without permission. I pay for leased land, too. Does this mean I pay for nothing? The vegetation is being destroyed." He said that I should go and tell the land board and those that investigate land problems such as mine because they are responsible for looking into that. He said that there was no way for him to tell me that this would be done but he said that the Land Board would probably look at my land. He said that if it was still bothering me I could come back and he would talk with me again.

5. I then told the land board (Lincoln Perry). He said someone would come investigate. No one did to my knowledge.

6. I went to Window Rock in early 1978 to see the head leader of the Navajo Tribe. I only saw an assistant, but he wrote down what I said while I was talking and said that someone would be out at my place. No one came to my knowledge. I saw Peter McDonald, our Tribal leader, at a squaw dance at Tom Julian's place. When he was free, I said to him that I had gone to Window Rock and saw someone, but nothing had been done. I said that the drillers were really walking all over me and I was sitting in the middle of nothing but dust. I asked if he had said yes to all of this. I said I had got some money, but if it is for the drilling

out all these problems for me. No one ever came to my knowledge.

7. Now I have such heartache after they tore up the land. I have no one to talk for me. I mentioned my problems to a lawyer at DNA and they say that they are doing something for me.

8. If they had told me at the trailer what they were planning, I would have never signed. My purpose in being in this lawsuit is unrelated to desires for financial gain from it. I am greatly upset at the disturbance to our plants, land and way of life. I want those people who make decisions which affect me to fully evaluate the effects of their decisions on the Navajo, so that better decisions will be made in the future.

R. Thumbprint

INTERPRETER'S AFFIDAVIT

Elsie Peshlakai, being duly sworn, deposes and says:

1. I am fluent in the Navajo and English languages;

2. I have read and interpreted the foregoing to Ha-nah-bah Charley in the Navajo language which she has indicated that she understands;

3. Ha nah-bah Charley agrees with all contained in the foregoing and has affixed her mark to it in my presence this 5 day of July, 1979.

Elsie Peshlakai

SUBSCRIBED AND SWORN to before me this 5 day of July 1979.

Notary Public

My commission expires:

March 13, 1981